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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

44

JANUARY AND MAY TERMS, 1907

BY

W. W. CORNWALL

VOLUME XVII
BEING VOLUME CXXXIV OF THE SERIES

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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

AT
DES MOINES JANUARY AND MAY TERMS, 1907
AND IN THE SIXTY-FIRST YEAR OF THE STATE

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F. E. WATKINS, Appellant, v. S. E. COUCH, Treasurer Buena Vista County, Iowa, F. F. FAVILLE and A. J. WILSON, Receivers.

Taxation: DELINQUENT PERSONAL TAX: DESCRIPTION OF LOCATION. A description of the place where personal property was assessed, as it appears upon the delinquent personal property list of the county treasurer, which will enable a competent person upon inquiry of the treasurer to ascertain the exact location is sufficient to charge the real estate of the delinquent with the tax, as against a subsequent purchaser of the land, especially where there is no question regarding the name of the delinquent, amount, or year for which the tax was assessed.

Appeal from Buena Vista District Court.—**HON. A. D. BAILIE, Judge.**

VOL. 134 IA.—1

1

TUESDAY, APRIL 2, 1907.

ACTION in equity to enjoin the treasurer of Buena Vista county from selling the real estate in controversy for the payment of personal taxes assessed against W. E. Brown, the former owner of the property. A supplemental petition was filed in the case, and a demurrer to the third count thereof was sustained. The plaintiff elected to stand on his pleadings, and appeals from the judgment on the demurrer. — *Affirmed.*

Milchrist & Scott, for appellant.

A. L. Whitney and *F. F. Faville*, for appellees.

SHERWIN, J.—The plaintiff bought the property in question from W. E. Brown in February, 1904. Brown had been assessed upon personal property for 1903, the taxes on which amounted to \$247.78. This tax he had not paid, and it was placed on the delinquent personal tax list by the treasurer of the county, the entry being made in the following form:

Name of Delinquent		1903
Brown, W. E. F.	Twp. Amt.	S L City 247.78

Code, Supp, 1902, sections 1389a–1389c, provide for the entry of all delinquent personal taxes of any preceding year in a book to be kept in the office of the treasurer as a part of the record thereof, and that a personal tax so entered in the delinquent personal tax list shall constitute a lien on any real estate owned or acquired by any such delinquent. Section 1389b is as follows: “Such entry of tax on delin-

quent personal tax list shall give the names of delinquents alphabetically arranged with amount of tax and for what year or years and where the property was located when assessed." In the count of his petition to which the demurrer was sustained, the plaintiff set out the form of entry made by the treasurer, and alleged that the taxes were not entered in the delinquent personal tax list as provided by section 1389b, the real objection thereto being that the entry did not show where the property was located when assessed. The only question for our determination, then, is whether the abbreviation "S L City" sufficiently complies with the requirement of the statute that the delinquent personal tax list shall show where the property was located when assessed.

The appellant says that it is important that the requirement of the statute be strictly complied with to the end that the entry may show without question where the personal property was situated when assessed, in order that an examination of the delinquent personal tax list may furnish information as to whether the tax was in fact assessed in the proper township or tax list. He relies upon The cases of *C., B. & Q. R. R. Co., v. Kelley*, 105 Iowa, 106, and *Accola v. C., B. & Q. R. Co.*, 70 Iowa, 185. In the former case the tax list showed the lot to have been assessed under the name of the owner to the "C. B. & Q. Ry." and we held that the initials did not indicate that the plaintiff was intended. In the *Accola* case the question arose on the taking of depositions for the perpetuation of testimony, and in the petition therefor the initials "C. B. & Q. R. Co." were used, and we held that they did not constitute the legal name of the Chicago, Burlington & Quincy Railroad Company. Neither of these cases, in our judgment, determines the question before us adversely to the contention of the appellees. It seems to be the general rule that in listing land it must be described with particularity sufficient to afford the owner or others interested in the question the means of identification and not to mislead them,

and when the land is thus particularly described, or when its location is made thus certain, it seems to be the general trend of authority that the description is sufficient. Cooley on Taxation (2d Ed.) 404.

Descriptions of land by abbreviations is held good in many cases. The proper test to be applied as gathered from these authorities is, is the description sufficiently definite to be identified by a competent person? And such descriptions are sufficient provided they are easily understood, not misleading, and full enough to point out the land with certainty. Black on Tax Titles, section 114; *Auditor General v. Fleming*, 142 Mich. 12 (105 N. W. 71); *Auditor General v. Sparrow et al.*, 116 Mich. 574 (74 N. W. 881); *Association v. Wagner*, 33 Ind. 51; *Paris v. Lewis*, 85 Ill. 597; *State v. Mayor of Newark*, 36 N. J. Law, 288.

In the last case cited the description that was assailed was "H. S. and Stable," and it was held to sufficiently describe house, lot and stable. In the Fleming Case, *supra*, the land was assessed as lot 5 in block 20, "Newell's E. & C. Plat." It appeared that there was a plat filed and recorded known as "Newell's Enlarged and Corrected Plat of the Village of Muskegon," and the court held that the abbreviations "E." and "C." were well understood; that it was impossible for any one to have been mistaken as to the map or plat referred to, because an examination would easily locate the property. In *National Bond Co. v. Board of Commissioners*, 91 Minn. 63 (97 N. W. 413), the Supreme Court of Minnesota held sufficient a description "N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ section 1, township 29 range 21 Exc. R. R. & Sts.," and said that by examination of the public records the purchaser could determine what land was laid out in streets and used as a railroad right of way. It is a general rule that, where a record discloses enough to put a careful or competent examiner upon inquiry, it is sufficient. *Jones v. Berkshire et al.*, 15 Iowa, 248. And, as will be seen by an examina-

tion of the cases heretofore cited, this rule is applied to the description of property in the assessment roll.

But the appellant seeks to evade the force of the rule on the ground that the statute says that the place where the property was located when assessed shall be stated on the delinquent tax list, and that strict compliance with the requirement of the statute demands a description so definite and certain in itself as to leave no room for inquiry. But in our opinion such a rule would in very many instances defeat the purpose of the statute, and we know of no sufficient reason for holding that a more definite description of the location of the property be required than is sufficient to put an interested party upon inquiry where it is evident that such inquiry or examination of the assessment roll itself will truly disclose the exact location of the property. In the case at bar an inquiry of the treasurer would undoubtedly have disclosed the fact that the letters "S L" meant Storm Lake, and that the personal property on which the assessment was made was located in Storm Lake City, township, or in the township where Storm Lake City was located. The name, the amount of tax, and the year were given, so there could be no question as to any matter except the location of the property that was assessed. The statute made the tax a lien upon all of the delinquent's real estate situated within the county, and when the name of the delinquent, the amount of the tax with which he was charged, and the year for which it was due were given in connection with the description herein disclosed, we think it was the duty of the plaintiff to make such inquiry as to the location of the property as he deemed necessary to the full protection of his interests, and that, after having been advised by an examination of the record that delinquent taxes which were a lien upon land were due from Brown, with the other information conveyed by the entry, he could not remain inactive and rely upon insufficiency of description as to location for the purpose of defeating the tax.

We therefore think the judgment of the district court right, and it is *affirmed*.

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ANDREW J. GARDNER V. WATERLOO CREAM SEPARATOR COMPANY, Appellant.

Negligence: ELEVATOR ACCIDENT: PROXIMATE CAUSE. It is the duty
 1 of the owner of premises to protect those who enter the building, through a door allowed to be used for that purpose, from the danger of falling into an elevator shaft in close proximity to the entrance, either by suitable barrier or by giving warning of the danger. In the instant case failure to guard the shaft or give the warning is held to have been the proximate cause of plaintiff's injury, rather than the failure of one previously entering the door to fasten the same.

Same: CONTRIBUTORY NEGLIGENCE. Persons rightfully entering a
 2 building may assume that reasonable precautions have been taken for their safety, and are not required to especially look for dangers the existence of which imply negligence on the part of the owner; and the question of contributory negligence of one falling into an unguarded elevator shaft on rightfully entering a building is held, under the circumstances, to be for the jury.

Negligence: UNGUARDED ELEVATOR SHAFT. The fact that the owner
 3 of premises containing an elevator has occupied and controlled the same but a short time, is no excuse in law for his failure to give notice of the danger or to properly guard the elevator shaft for the protection of one who goes upon the premises at his invitation, and who at the time is in the exercise of ordinary care.

Exclusion of evidence: HARMLESS ERROR. Refusal to permit evi-
 4 dence which is a mere conclusion of the witness with reference to facts to which he has already testified is not erroneous.

Appeal from Blackhawk District Court.—HON. A. S. BLAIR, Judge.

TUESDAY, APRIL 2, 1907.

ACTION to recover damages for personal injuries resulting from falling down an open elevator shaft on defendant's premises. Verdict and judgment for the plaintiff. Defendant appeals.— *Affirmed*.

Courtright & Arbuckle, for appellant.

Reed & Tuthill, for appellee.

MCCLAIR, J.— The premises on which the accident occurred had been occupied by the defendant for about ten days, and were being put in order for use as a manufacturing establishment, when plaintiff, in the employ of a lumber company, brought to the premises in a sleigh two sash which had been ordered by defendant. Plaintiff drove along the railroad track beside which defendant's building stood, crossed a platform provided for convenience in loading cars from the building, and approached a sliding door furnishing access to the platform from the building. This door had no handle or other means of opening it from the outside, but was provided on the inside with a hook for a fastening. It had been used several times during the day before plaintiff approached it as a means of ingress to the building, and plaintiff found it unfastened and pushed it open, and, on stepping inside and closing it after him, fell into an unguarded elevator shaft which was within eighteen or twenty inches of the inside of the door, receiving the injuries for which he asks damages.

The contention with reference to the facts on which it is claimed for appellant that there was no negligence on its part, and contributory negligence on the part of plaintiff, is that the door used by plaintiff was not the usual and proper method of entering the building, that the door itself furnished a sufficient guard or protection for the entrance to the elevator shaft, and that plaintiff in the exercise of ordinary care could have seen the opening and avoided the in-

jury. The evidence tended to show, however, that other persons had entered the building over the platform, and through the door by which plaintiff entered, during that day and on preceding days, and that the entrance to the premises from the street on the opposite side was blocked by snow. It also appeared that other persons had been in the habit of driving along the railroad track, which was suitable for use as a driveway, and entering the building across the platform.

I. The door through which plaintiff entered had been left unhooked by a person who had been admitted to the building through this same door a few minutes before plaintiff entered, and the first contention for appellant is that as this door furnished the guard for the entrance to the elevator, and access to the open shaft by the plaintiff was due to the negligent act of a third person, such act, and not the negligence of the defendant in failing to protect the elevator shaft or warn the plaintiff of the danger, was the proximate cause of the injury to plaintiff, and therefore that defendant is not liable. But we think that a door which is allowed to be used for access to a building does not constitute a sufficient guard for an elevator shaft situated eighteen inches from such door, and that the defendant owed to those who came in through the door the duty of protecting them against the danger of falling into the shaft, either by a barrier provided at the entrance to such shaft, or by warning given of the danger, and that the act of the person who entered the door preceding the entrance by plaintiff was not the proximate cause of plaintiff's injury.

It appears that the person who entered preceding plaintiff had been taken up the elevator by an officer of the company, in charge of the building, who took no precaution to see that the door was left hooked, and that an employé of the defendant standing near by and charged with a duty in reference to the safety of persons approaching the elevator shaft saw plaintiff enter the door and gave him no warn-

ing as to the shaft. Under these circumstances it is clear that the proximate cause of the injury to plaintiff was not the act of a third person in leaving the door unhooked, but the negligence of the defendant in not furnishing a sufficient barrier or giving proper warning. The case of *Cole v. German Savings and Loan Society*, 124 Fed. 113 (59 C. C. A. 593, 63 L. R. A. 416), is not in point, for there the owner of the premises had provided a sufficient gate at the elevator opening, and this gate was opened for the plaintiff by a stranger supposed by plaintiff to be the elevator boy, but for whose conduct the owner was in no way responsible. Counsel for appellant also rely on the case of *Parmenter v. Marion*, 113 Iowa, 297, where the negligent act of the owner of premises abutting on a street in throwing a bale of hay from a platform projecting over the street was held to be the proximate cause of an injury, and that the city was not liable on account of allowing the platform to be improperly maintained in the street. In that case the efficient cause of the injury was held to be the act of the owner of the premises in throwing down the bale of hay, and the improper maintenance of the platform in the street only the condition under which the injury resulted. We cannot see that there is any essential similarity between the case cited and the one before us. It is to be noticed here that the negligence of defendant consisted in allowing the elevator shaft to be unguarded in such close proximity to a door through which plaintiff was invited to enter that it was dangerous to plaintiff to enter at such door. This negligence of the defendant was the real occasion of the injury to plaintiff, and the court committed no error in instructing the jury that it was no valid excuse for defendant that the third person may have opened and left unlatched the door through which plaintiff entered the building.

II. The lower court overruled a motion of defendant to direct a verdict in its favor on the ground that it affirmatively appeared from the evidence that the proximate cause

of plaintiff's injury was his own negligence, and this ruling

2. SAME: contributory negligence.

is assigned as error. But we think it was properly left to the jury to say whether there was negligence on the part of the plaintiff contributing to his injury, in view of the circumstances under which he fell into the elevator shaft. He had a right to assume, in opening the door through which he entered and in turning to close it after him, that he would be protected by barrier or warning against any danger immediately incident to his entrance through such door. It was certainly not conclusively negligence in him to turn after entering the door and close it behind him for the purpose of proceeding about the business for which he had been invited to come upon the premises. He was not bound to stop and look for danger, and, while it was his duty to use his faculty of sight as reasonably careful persons ordinarily do in going about their business, he was not bound to take any special precautions for his safety at this place. The cases relied upon by counsel for appellant are those in which it is said that one going into places not intended for the general use of persons invited to enter a building for business purposes must take precautions against dangers from stairways, openings, or obstructions. See *Bedell v. Berkey*, 76 Mich. 435 (43 N. W. 308, 15 Am. St. Rep. 370); *Hutchins v. Priestly Wagon, etc., Co.*, 61 Mich. 252 (28 N. W. 85); *Johnson v. Ramberg*, 49 Minn. 341 (51 N. W. 1043); *Gaffney v. Brown*, 150 Mass. 479 (23 N. E. 233); *Massey v. Seller*, 45 Or. 267 (77 Pac. 397). But, on the other hand, it is well settled that persons rightfully in a building may go about for the purpose for which they have been invited to enter, assuming that reasonable precautions have been taken for their safety, and are not bound to especially look for dangers the existence of which would imply negligence on the part of the owner. *Tousey v. Roberts*, 114 N. Y. 312 (21 N. E. 399, 11 Am. St. Rep. 655); *Engel v. Smith*, 82 Mich. 1 (46 N. W. 21, 21 Am. St. Rep. 549); *Pelton*

v. Schmidt, 104 Mich. 345 (62 N. W. 552, 53 Am. St. Rep. 462); *Hendricken v. Meadows*, 154 Mass. 599 (28 N. E. 1054); *Brosnan v. Sweetser*, 127 Ind. 1 (26 N. E. 555); *People's Bank, v. Morgolofski*, 75 Md. 432 (23 Atl. 1027, 32 Am. St. Rep. 403). The court did not err therefore in leaving it to the jury to say whether under the circumstances plaintiff was guilty of contributory negligence.

III. An instruction is complained of in which the jury were told that the fact of having occupied and controlled premises containing an elevator shaft for only a short time is no excuse in law for failure on the part of the occupant of the premises to properly guard such elevator shaft for the protection of one who goes upon said premises at his invitation and is using at the time the reasonable care of an ordinarily prudent man under such circumstances. It is said that there must be some time in the process of moving into and refitting a building prior to which the occupant is not to be held responsible for a defective elevator. But we think that the duty of the occupant of a building to have it reasonably safe for those who are invited to come there in connection with his business is a duty existing at the time when the invitation to enter the building is given. There is no evidence whatever that plaintiff or his employer was advised that it would be dangerous to bring the sash ordered into the building at the time when they were brought there. It is true that cards were posted on the outside of the building on which were the words: "Positively No Admittance. Keep Out." But it is not claimed that these cards were put there for the purpose of warning persons who were coming to the building on matters of business at the invitation of the defendant from entering. The injunction conveyed by the language of the cards did not purport to be based upon any danger involved on account of the building not being in condition for the usual transaction of business.

IV. Plaintiff testified as a witness in his own behalf,

and on cross examination was asked several questions as to whether if he had looked he could have seen the open elevator shaft, whether there were not posts at the corners of the elevator shaft, which if he had looked he could have seen, and whether or not there was light enough there so that if he had looked the building over he could have seen what there was on the inside of it. Objections to these questions were sustained, and these rulings are complained of. These questions called for the conclusions of the witness with reference to facts as to which he had fully testified, and under such circumstances we think his conclusions would have been incompetent. He had already said that he could have seen everything there was inside the building if he had looked, and that he did not remember seeing the posts referred to, and was not looking for them. There could have been no prejudicial error in the rulings even though the questions were not in themselves objectionable.

Finding no error in the record, the judgment of the trial court is *affirmed*.

THE W. T. JOYCE Co., Appellant, v. D. A. ROHAN.

Negotiable instruments: CONSIDERATION: COMPOUNDING CRIME. It is not necessary to show that a crime was in fact committed to defeat an action on a note given to compound the offense charged.

Same: AGENCY: QUESTION OF FACT. Where there was evidence tending to show that the payee of a note, who filed the information charging defendant with the crime and accepted the note in compounding the offense, was acting as the agent of the indorsee in both matters, the question of agency was for the jury and a direction of verdict for the indorsee in a suit on the note was erroneous.

Appeal from Carroll District Court.—HON. F. M. POWERS, Judge.

WEDNESDAY, APRIL 3, 1907.

SUIT on a promissory note signed by the defendant and J. A. Mavity. There was a directed verdict for the plaintiff, and thereafter the defendant's motion to set the verdict aside was sustained. The plaintiff appeals.—*Affirmed.*

Lee & Robb, for appellant.

Geo. W. Bowen, for appellee.

SHERWIN, J.—This suit is on an ordinary promissory note made payable to one E. C. Spurr and alleged to have been transferred to the plaintiff before maturity. The defendant Rohan in his separate answer admitted the execution of the note, but alleged as a defense thereto that it was without consideration and that it was given for the purpose of settling a criminal charge made against his co-signer, J. A. Mavity, that the note was given for the sole purpose of compromising and compounding a felony, and was so received by said Spurr, who was the plaintiff's agent, with such understanding. At the close of the testimony the plaintiff moved for a directed verdict, on several grounds; among others, that the defendant had failed to allege in his answer, or to prove, that a crime was in fact committed by the defendant Mavity, the compounding of which constituted any part of the consideration of the note sued on, and that the defendant had failed to show that the plaintiff had any knowledge or notice, actual or constructive, that the note in suit was obtained by the compounding of a felony. The court was clearly right in setting aside the verdict which had been directed and in granting a retrial of the case. It is true there was no evidence tending to support the charge of embezzlement that had been made against Mavity in an information sworn

1. NEGOTIABLE
INSTRUMENTS:
consideration:
compounding
crime.

to and filed by Spurr, the payee of the note, but it is not necessary in a case of this kind to show that the crime which it is alleged was compounded was in fact committed. *Shaulis v. Buxton*, 109 Iowa, 355; *Smith v. Steely*, 80 Iowa, 738; *State of Iowa v. Ruthven*, 58 Iowa, 121.

There is evidence in the record tending to show that Spurr, who was the payee named in the note, was the agent of the plaintiff in Carroll county. As we have seen, the information which was filed against Mavity was
2. SAME: agency:
question of
fact. filed by Spurr. It charged Mavity with the crime of embezzling from the plaintiff in this case, the W. T. Joyce Company, alleging the company to be a corporation. It is a general rule of law that whatever evidence has a tendency to prove an agency is admissible, even though it be not full and satisfactory, and it is the province of the jury to pass upon it; and it is equally as well settled that, when one knowingly and without dissent permits another to act as his agent, the capacity will be conclusively presumed. In this case Spurr was shown to be the agent of the plaintiff in the transaction of other business, or, at least, there was evidence before the jury tending to so show. He appeared before the justice and filed an information against Mavity, charging him with the crime of embezzling from this plaintiff; thereafter this note was given for the purpose of settling that criminal charge, and still later the note was transferred to the plaintiff by Spurr, their agent, and sued upon by them. All of these transactions constituted evidence from which the jury might have found that Spurr was in fact acting as the plaintiff's agent and for it in making the criminal charge and in settling the alleged embezzlement by taking the note in suit. This being true, it was clearly error, under the rule heretofore announced, to direct a verdict for the plaintiff. It was a question for the jury, and should have been submitted to it.

The order setting aside the verdict was right, and it is affirmed.

JOHN FINN, Appellant, v. JOHN J. SEEGMILLER, ANNIE SEEGMILLER, MARY SEEGMILLER, JACOB SEEGMILLER, and THE CITIZENS' SAVINGS BANK OF DECORAH, IOWA.

Negotiable instruments: LIMITATION: REVIVER. To revive a cause
1 of action founded upon contract the written admission must clearly and directly express the indebtedness admitted; an agreement reviving one note of a series is not an admission that the others are unpaid.

Taxation of costs: REMITTITUR BY APPELLATE COURT. The Supreme
2 Court will not remit attorney's fees excessively taxed to which the attention of the trial court was not called.

Appeal from Winneshiek District Court.—HON. L. E. FELLOWS, Judge.

WEDNESDAY, APRIL 3, 1907.

ACTION to recover judgment on three promissory notes executed by defendants to one Tim Finn, and to foreclose a mortgage securing the same. Defendants pleaded the statute of limitations as to the second note, and offered to confess judgment on the other two notes for the amount of the principal thereof and accrued interest remaining unpaid and for attorney's fees. The court sustained the plea of the statute of limitations as to the second note, rendered judgment on the other two notes, and decreed foreclosure of the mortgage for the amount thus found due. Plaintiff appeals.—*Affirmed.*

E. W. Cutting, for appellant.

E. P. Johnson, for appellee.

McCLAIN, J.—The three notes sued on and the mortgage securing the same were executed by defendants John J.

Seegmiller and Annie Seegmiller, June 1, 1892. The notes for \$300 each, with interest, were made payable by their terms in two, three, and four years, and this action was instituted on June 10, 1905, which was more than ten years after maturity of the first two notes. In May, 1904, the signers of the notes executed a written acknowledgment in the following terms: "Know all men by these presents: That we, John J. Seegmiller and Annie Seegmiller, his wife, of Winneshiek county, Iowa, hereby acknowledge that a certain promissory note made by us June 1st, 1892, in favor of Tim Finn, and which note is payable by its terms, June 1st, 1894, and is wholly unpaid except the interest thereon which is paid to June 1st, 1901, and which note has been sold and transferred to John Finn by said Tim Finn. And we do hereby renew said note and hereby promise and agree to pay the same according to its terms on or before June 1st, 1905. We also hereby renew the mortgage agreement given to secure said note." The sole question before us is whether this acknowledgment, expressly referring to the first note, constitutes an admission in writing that the second note remained unpaid, within the provision of Code, section 3456, that "Causes of action founded on contract are revived by an admission in writing signed by the party to be charged, that the debt is unpaid, or by a like new promise to pay the same."

The contention for appellant is that, as the law will apply payments to notes in the order of their maturity, in the absence of any express stipulation by the parties, the admission that the first note remained unpaid gave rise to a presumption that the second note described in the same mortgage and secured thereby also remained unpaid. But we see no force in this contention. The defendants were under no obligation to pay the notes, all of which were due at the time the admission was made, in the order of their maturity. So far as the admission is concerned, the second note may have been paid, or

1. NEGOTIABLE
INSTRUMENTS:
limitation;
reviver.

the defendants may have intended not to pay it if the statute of limitations should be allowed to run as against it. The admission had no reference whatever to any other note than the one expressly described therein. An admission such as is required by the statute does not arise by mere implication. It must be express, clear, and direct, with reference to the indebtedness admitted. Parol evidence is competent to connect the admission with the indebtedness referred to therein, but not for the purpose of implying a promise to pay an indebtedness not therein referred to. *Kleis v. McGrath*, 127 Iowa, 459; *Miller v. Beardsley*, 81 Iowa, 720; *Nelson v. Hanson*, 92 Iowa, 356. The reference to the mortgage contained in the admission as above set out relates only to the note described. There is no admission whatever that the other notes secured by the same mortgage remain unpaid.

Counsel for appellee suggests that the admission in his answer as to the amount of attorney's fee for which judgment might be rendered on his confession as to the first note, which

2. TAXATION OF
COSTS: remit-
titur by ap-
pellate court.

had been renewed by the written acknowledgment, and the third note, which was not yet barred when action was brought, was by inadvertence for too large an amount, and asks that it be reduced to the extent of \$16.33. But the attention of the lower court was not called to this error, and the defendants have not appealed. We have no authority, therefore, to order a remittitur as against appellant.

The judgment and decree of the trial court is *affirmed*.

THE STATE OF IOWA, Appellee, v. CARL HOOVER, Appellant.

Rape: CORROBORATION: WHEN IMMATERIAL. A conviction for simple
1 assault operates as an acquittal of a charge for assault with intent to rape, and alleged erroneous rulings and instructions regarding corroborating evidence are eliminated, as no corroborating evidence in case of assault is required.

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Same: EVIDENCE: STATEMENTS OF PROSECUTRIX. On a prosecution
2 for rape the complaining witness may state that at another time and place she recognized defendant as her assailant, but in the absence of words or conduct on his part tending to point him out as the guilty party she should not be permitted to give the conversation, unless the same occurred at the time and place of the alleged crime, or so closely connected therewith as to be a part of the *res gestæ*.

Hearsay evidence. Hearsay evidence is sometimes admissible for
3 the purpose of fixing a date, but this exception to the general rule should be applied with caution because of the danger that the jury may give effect to the same as substantive proof of the fact embodied in the hearsay statement. In the instant case the evidence is held to have been prejudicial.

Appeal from Audubon District Court.—HON. O. D. WHEELER, Judge.

WEDNESDAY, APRIL 3, 1907.

THE defendant was indicted for assault with intent to commit rape upon one Lena Peterson. There was a verdict of guilty of simple assault, and from the judgment entered upon said finding he appeals.—*Reversed*.

W. C. Elliott and J. M. Graham, for appellant.

H. W. Byers, Attorney-General, and *C. W. Lyon*, Assistant Attorney-General, for the State.

WEAVER, C. J.—I. It is argued in behalf of the appellant that the evidence on part of the State was insufficient to justify the trial court in submitting a charge of assault with intent to commit rape to the finding of the jury. Without attempting to rehearse the testimony of the witnesses, we have to say that while the case made by the State in this respect does not seem to have been very strong or conclusive, there was not, in our opinion, such an entire absence of evidence in support of the charge as to require the court to

withdraw it from the jury, and this assignment of error cannot therefore be sustained.

II. As the appellant was convicted of simple assault, the verdict of the jury operates as an acquittal of the graver charge of assault with intent to commit rape. This result of necessity eliminates all question of any alleged error on part of the trial court in its rulings and instructions concerning the necessity of corroborating the testimony of the prosecuting witness. No corroboration was required in order to uphold conviction of simple assault.

1. RAPE: corroboration: when immaterial.

III. According to the story of the prosecuting witness, she was on her way home from school, and while crossing a bridge at a point about a mile from the schoolhouse she was accosted by a young man who proposed sexual intercourse, and took hold of her and attempted to draw her under the bridge, when she broke away and ran to a neighboring house where she complained of the assault. No other person witnessed the transaction. The girl had no acquaintance with the appellant prior to this time, but had seen him on several occasions. She says that she did not at first recognize him as the person who assaulted her, but after she had broken away from him she did recognize him as the appellant, and spoke to him, saying, "If I know you, your name is Carl Hoover," and that the person thus addressed answered saying that it was not his name. It may be further stated that the entire evidence of this witness as well as the statement made by her before the court tend strongly to show that she was quite uncertain as to the identity of her assailant. If to this we add the further fact that the defense was based very largely upon an alleged alibi, the importance of the evidence to which we are about to refer will become very apparent. Soon after the alleged assault the defendant was arrested and taken to the office of the county attorney where he was confronted with the prosecuting witness. On the trial in the court

2. SAME: evidence: statements of prosecutrix.

below, the complaining witness being on the stand, her attention was called to her meeting with the appellant to which we have just referred as having taken place in the office of the county attorney, and she was asked to state the conversation which there took place. Much of this matter was admitted in testimony over objection on the part of appellant.

To make clear the point and force of these objections we quote the testimony, questions, and answers, omitting only the specific objections and exceptions which were all properly preserved. Referring to this interview, the county attorney asked the witness: "Q. What did you say to him? A. Why, I didn't say anything to him down in your office. Q. Just think about that, Lena, do you remember whether at that time, whether you told him that he was the one, or not? A. I didn't tell him; but I told you that it was him. Q. Do you know whether you told me that in his presence, or not? A. I told him when he was in there. I told you when he was in there. Q. Do you remember what he said? A. Why, he said to you that he didn't. That all he had to say that he could prove where he had been. Q. Do you know whether or not he said that he was not the one? A. I didn't know whether he said that. I don't think he said that. Q. Did you hear him say it? A. No, sir. Q. When you were in my office there and Carl Hoover was there did you, or did you not, then know whether that he was the person that you saw down at the bridge on Friday night, October 6, 1905, and that you say had hold of you? A. Yes; that was him that was in your office that stopped me down on the bridge."

The effect of these rulings was to enable the State to get before the jury the statements made by the complaining witness to the county attorney charging the appellant with being the person who had assaulted her. Under the rule recognized by this court in the case of *State v. Egbert*, 125 Iowa, 443, the admission of this testimony was prejudicial error. It would, we think, have been entirely competent to

have shown, if such was the fact, that when the appellant was confronted by the complaining witness she recognized and identified him as her assailant, or that when accused by her of the alleged assault he admitted his guilt or made statements tending to compromise him in that respect; but, in the absence of words or conduct on his part having a tendency to point him out as the guilty person, the State should not be permitted to prove the unsworn and hearsay statements of the complainant or of any other person. In the Egbert case to which reference is above made the prosecuting witness was permitted to testify that when the sheriff brought the accused into her presence she not only recognized him as the man who assaulted her but that she declared to others that she so recognized him. In holding that the admission of these statements as evidence was unauthorized we said: "We know of no authority for admitting proof of the declaration of the prosecuting witness not constituting part of the *res gestæ* with reference to the identity of the defendant with the person committing the crime. Certainly it is not competent to thus build up a case against the defendant by proving declarations of the prosecuting witness with reference to his identity. Of course, the fact of complaint by prosecutrix may be shown, and no doubt as a witness she may testify that she recognized the defendant as the person who committed the crime, but what she said is not in itself competent evidence on the question of identity."

It will be observed by reference to the testimony which we have above quoted from the record that it was only after some urging and suggestive questions by the county attorney that the prosecuting witness was brought to state the conversation which the prosecutor wished to bring out. Even then she does not testify to any admission made by the appellant, but, on the contrary, says in effect that he denied his guilt. There was nothing whatever in that interview so far as it is brought out in this testimony which in any manner tends to corroborate the story of the witness or to identify the appel-

lant as the person who assaulted her. Her story upon the stand that the appellant was the person who assaulted her was, of course, competent, but she cannot be allowed to give weight to that statement by proving that at some other time or place, not in court, she pointed him out as the guilty person. This rule will be understood, of course, as being subject to an exception where the statements sought to be proved were made at the time and place of the alleged crime, or so closely connected therewith as to be a part of the *res gestæ*.

IV. Among the witnesses examined on the part of the State was Andrew Anderson, a boy of eight years of age, who testified in substance that he knew the appellant, and that he once saw him going along the street past the house where witness resided in the direction of the bridge where the assault is claimed to have been committed. He did not attempt to fix the date of this occurrence. On cross-examination he said that he did not know which is east, west, north, or south; did not know the month or the year at the time of the trial; did not know the date of his birth-day; did not remember the time when he saw the appellant go by the house, nor the month in which it occurred, nor whether it was last summer; but did remember that it was on Friday. He further stated that he did not know what was meant by an oath, nor what was meant by being a witness; and did not know whether the occurrence to which he testified took place last summer or last spring, but that he told his mother at the time he saw the appellant pass in the road. Objection to this testimony and motions by the defendant to strike it out as irrelevant and hearsay were overruled, and the state thereupon introduced the mother of the boy as a witness, and she was permitted to testify that on Friday, October 6, 1905, the date of the alleged assault, and about the hour of its occurrence, she saw some man whom she did not know going along the road north past her home, and she asked her little son, the young witness just referred to, who the person was, and that he replied to her inquiry

3. HEARSAY
EVIDENCE.

that it was Mike Hoover, the appellant being sometimes called or known as Mike. In overruling the objections to this testimony the trial court said that the evidence was not received for the purpose of establishing the truth of what the boy said; but for the purpose of showing the boy had made some remark of that character, but not as to the truth of the remark, or to the fact that it was Carl Hoover. We are of the opinion that this evidence should not have been admitted, and that the qualifications which the court sought to attach thereto were not sufficient to cure the error. It is to be admitted that hearsay statements are sometimes competent as evidence, when used simply for the purpose of fixing the date of some pertinent fact or transaction. But such limitation was not clearly attached to the admission of the evidence now under consideration. *State v. Dunn*, 109 Iowa, 750; *People v. Mead*, 50 Mich. 229 (15 N. W. 95); *Stewart v. Anderson*, 111 Iowa, 329; *Agulino v. Railroad Co.*, 21 R. I. 263 (43 Atl. 63); *Hill v. North*, 34 Vt. 616; *Earle v. Earle*, 11 Allen (Mass.) 1.

Had the testimony in this case and the restrictions put on it by the trial court come fairly within this exception to the general rule, there would have been no error in the ruling of which the appellant complains. The exception, however, is one that should be applied with considerable hesitancy because of the evident danger that the jury will, in spite of the caution by the court, give effect to such evidence as substantive proof of the fact embodied in the hearsay statement and not limit its effect to its legitimate purpose of fixing a disputed date. It should be further stated that it is ordinarily sufficient for such purpose to prove the fact that a conversation was had upon the subject without relating to the jury the statements made in such conversation, unless same be called for upon cross-examination by the party against whom the evidence is offered. In the case at bar, the very evident inexperience and immaturity of the boy witness was such as to entitle his testimony to very little weight or

influence with the candid mind, and his attempt to relate an event which took place several months before, unaccompanied by any particular fact or circumstance to fix it in his mind, is so indefinite and unsatisfactory that standing alone no court would have any hesitation in pronouncing it entirely incompetent. The testimony of the boy's mother was scarcely more definite than his own. After first answering that she did not remember whether she saw anyone go past her house on the afternoon or evening referred to, and being further interrogated she answered she did see some one go by her house on Friday afternoon, October 6, 1905. She did not recognize him and could not tell whether he was an old or young man, and she did not notice how he was clothed, whether he wore a hat or a cap; but she claims to remember that she asked her boy who the person was, and received from him the answer that it was Mike Hoover.

It must be conceded, we think, by the State that the testimony of neither of these witnesses taken by itself offers any evidence whatever tending to support the theory of the prosecution, and, in our judgment, the effect is in no manner strengthened or increased when we come to consider them together. We might be inclined to say that the admission of this testimony was error without prejudice, if the record as a whole seemed to make a strong and convincing case against appellant; but the story of the prosecuting witness, while entirely credible and candid as to the fact of the assault upon her at the time and place mentioned, is nevertheless marked by much uncertainty as to the identity of the defendant as the guilty person, while, on the other hand, the ability set up in his behalf is supported by such a large number of witnesses of whose credibility there seems to be no fair reason to doubt, that it seems entirely possible that the objectionable evidence to which we refer may have been directly effectual in bringing about a conviction. Some other alleged errors have been argued by counsel, but the points thus raised are covered by

the questions we have just considered, or are of such a character as not to be liable to arise on a new trial.

For the reasons stated, a new trial must be ordered, and for that purpose the judgment of the district court is *reversed*.

STATE OF IOWA, v. ANDREW P. THOMPSON, Appellant.

184	25
143	402
143	403

Inland lakes: RIGHTS OF RIPARIAN OWNERS. A riparian owner of land bordering on an inland lake, in which the water raises and lowers as dictated by the seasons and climatic conditions, takes only to high water mark.

Appeal from Hancock District Court.—HON. CLIFFORD P. SMITH, Judge.

WEDNESDAY, APRIL 3, 1907.

ACTION in equity for an injunction decree. The opinion states the case. A decree as prayed for was granted, and the defendant appeals.—*Affirmed*.

Peterson & Knapp, for appellant.

C. W. Mullan, Attorney-General, John Hammill, and John E. Wickman (H. W. Byers, present Attorney-General, on the brief), for the State.

BISHOP, J.—This action was brought on behalf of the State to enjoin the defendant from proceeding with the work of constructing a ditch designed to drain off the waters from West Twin Lake in Hancock county. As meandered by government survey, the lake embraces about one hundred and twenty-two acres, and defendant owns all the adjoining lands lying to the east and west and south thereof. It is conceded that waters of the lake are gathered from the fall of rain and snow and by drainage from the surrounding lands; there

is no inlet stream, nor at present any spring. It is the theory upon which the action is brought that the bed of said lake within the meander lines is the sole property of the State, and that to drain the same or decrease the depth of water therein by artificial means as designed and being attempted by defendant would be contrary to the rights of the State, and violative of its policy to preserve all lakes within its borders. It is not denied by defendant but that, on its admission to the Union, the State became the owner of all lands forming the bed of the inland lakes within its borders, which had been meandered by government survey and excluded from the public lands as was the lake in question. It is the contention of defendant that, as in the course of years the lands in the vicinity have come into occupation and cultivation for farming purposes, the waters of the lake have gradually and imperceptibly receded from the original shore line until the lake bed has become practically dry: there being for the most part only pools of stagnant water remaining in the deeper depressions of the bed, and constituting a menace and danger to the public health, convenience, etc. And it is said that as the shore line has receded, plaintiff has taken possession of the bed lands, and has used the same for the purposes of hay and pasture lands, and that beginning about the year 1895 he has thus been in the occupation and use of the entire bed under fenced inclosure. From this, and pinning his faith to the doctrine of accretion and reliction, the claim is made that defendant, as riparian owner, became vested with exclusive right and title to all such lands.

Counsel on both sides have been at pains to discuss exhaustively in argument the law defining riparian ownership and the rights growing out of the same; but, as we read the record, the facts are against the contention of defendant, and, accordingly, we shall have but little occasion to take note of the legal phase of the case. That at the time of the meander survey, the lake was a well-defined body of water, with gravel or sand beach and high banks, is not seriously ques-

tioned. It is true that since then the stage of water has fluctuated. In seasons of average rainfall the bed has been covered, and frequently to the depth of six or more feet in the center portion: the shore line reaching nearly if not quite to the meander line. In dry seasons the water surface has been lowered, and in the three years beginning with 1899 — a succession of dry seasons — the water disappeared except in pools here and there as the natural depression in the bed permitted. Following those years the lake again filled, and, at the time of the trial of this case, the entire bed was covered with water to the depth of six feet in the center: the shore line reaching to and in places overlapping the meander line. It is the testimony that the water is clear, and during a number of winters ice had been harvested from the lake for domestic consumption. Originally there were game fish in the lake, but these disappeared with the dry seasons of which mention has been made. It appears, however, that in the summer of 1903, the lake was again stocked with fish under the direction of the State Fish Commissioner. While not altogether undisputed, the foregoing are the facts as fairly established by the evidence. The case we have, then, is one presenting a lake with stages of water alternating from high to low as dictated by the seasons and climatic conditions. With such fact situation before us, it becomes clear that we need not enter the field of discussion presented by a case where there has been a practically complete and permanent recession of water from a lake bed. It is the rule in this State that as related to an inland lake a riparian owner takes to high-water mark only. *McManus v. Carmichael*, 3 Iowa, 1; *Tomlin v. Railway*, 32 Iowa, 106; *Noyes v. Collins*, 92 Iowa, 566; *Barney v. Keokuk*, 94 U. S. 324 (24 L. Ed. 224).

It follows that, as the defendant had acquired no rights in the lake bed in question, such as to authorize him to drain it by artificial means, the decree enjoining him from proceeding with the work of drainage as commenced was properly entered.— *Affirmed*.

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DELAVAL SEPARATOR COMPANY, Appellant, v. E. D. SHARPLESS, HARL & TINLEY, CHAS. M. HARL, EMMET TINLEY, T. Q. HARRISON, and EDWARD CANNING, Sheriff.

Enforcement of judgment by assignee: INJUNCTION: SETOFF.

- 1 The assignee of a judgment on a replevin bond taken in satisfaction of an attorney's lien for services rendered plaintiff in the action, holds the same subject to any setoff in favor of the judgment debtor as against the assignor, even without notice thereof; and an injunction will issue to restrain the enforcement of the judgment.

Same: ESTOPPEL. The fact that plaintiff in replevin had not given

- 2 notice of a setoff against a judgment rendered on his bond, is not ground for estoppel precluding him from maintaining a suit in injunction to restrain enforcement of the judgment in the hands of an assignee.

Appeal from Pottawattamie District Court.—HON. O. D. WHEELER, Judge.

MONDAY, APRIL 8, 1907.

ACTION in equity to restrain the enforcement of a judgment against the plaintiff by defendant Sharpless, the party in whose favor the judgment was recovered, or by defendants Harl & Tinley, assignees of such judgment, on the grounds that defendant Sharpless is insolvent and that plaintiff had, prior to the assignment, a valid claim against Sharpless in an amount exceeding the amount of the judgment. Plaintiff's application for temporary writ of injunction having been denied, the plaintiff appeals.—*Reversed.*

C. F. Vogel and Stillman & Price, for appellant.

Harl & Tinley, for appellees.

McCLAIN, J.—From the allegations in the pleadings, which are deemed true for the purpose of determining the correctness of the ruling of the trial court refusing a temporary injunction, it appears that in February, 1904, the defendant Sharpless obtained a judgment in the district court against the plaintiff herein on a replevin bond in an action wherein this plaintiff sought to recover certain cream separators, which had been sold by it to Sharpless, wherein it was held that said cream separators were the property of said Sharpless and wrongfully taken from him under the writ of replevin (see *De Laval Separator Co. v. Sharpless*, 129 Iowa, 114); that at the time said judgment was recovered Sharpless was indebted to plaintiff on account for the purchase price of said separators, and others of the same description, purchased by him from plaintiff, in an amount exceeding the amount of his judgment; that defendants Harl & Tinley had an attorney's lien on the judgment in favor of Sharpless for services in recovering such judgment, and took an assignment thereof before it was affirmed on appeal to the Supreme Court in payment of the services already rendered and to be rendered in the case; that prior to said assignment plaintiff had not made or asserted any right or claim against Sharpless on account of his indebtedness to plaintiff, and Harl & Tinley accepted the assignment in payment of their fees for services already rendered and to be rendered, in reliance upon said assignment and their lien, without knowledge that plaintiff had any claim against Sharpless; and that Sharpless is, and has been, since the institution of the replevin suit, insolvent, so that plaintiff is, and has been, without adequate remedy at law to prevent the irreparable injury which would result from the enforcement by Sharpless or Harl & Tinley, his assignees, of the judgment recovered by Sharpless against the plaintiff.

As against Sharpless, the right of the plaintiff to have relief in equity to prevent the enforcement of the judgment, so as to defeat the setting off of Sharpless' indebtedness to

plaintiff, Sharpless being insolvent, is perfectly plain. The facts bring the case completely within the general jurisdiction of equity to enforce a set-off. In the replevin suit, in which Sharpless recovered his judgment, the indebtedness of Sharpless to plaintiff on account could not be interposed as a counterclaim (Code, section 4164); and, if Sharpless were to be allowed to enforce his judgment, plaintiff would be in the position of being compelled to pay this judgment, although Sharpless is indebted to it in amount in excess of the judgment in his favor. That a court of equity will furnish relief by way of decreeing an equitable set-off in such cases is well settled. *Marshall v. Cooper*, 43 Md. 46, 59; *Railroad v. Greer*, 3 Pickle (Tenn.) 698 (11 S. W. 931); *Merrill v. Souther*, 6 Dana (Ky.) 305; *O'Neil v. Perryman*, 102 Ala. 522 (14 South. 898); 1 Pomeroy, Equity Jurisprudence (3d Ed.), section 189. To defeat this equitable right of plaintiff, defendants Harl & Tinley insist on their assignment, taken without notice, as they allege, that plaintiff had any claim against Sharpless. So far as their rights under the assignment are predicated upon their attorney's lien, they are, however, subject to any right of set-off which plaintiff had at the time the judgment was recovered. Their lien was on money due their client in the hands of the adverse party (Code, section 321); and, if at the time the judgment was recovered, Sharpless owed plaintiff more than the amount of the judgment recovered by him against plaintiff, then there was no money in the hands of plaintiff due to Sharpless. *Watson v. Smith*, 63 Iowa, 228; *Tiffany v. Stewart*, 60 Iowa, 207; *Benson v. Haywood*, 86 Iowa, 107; *Marshall v. Cooper*, 43 Md. 46, 61. As assignees of the judgment, Harl & Tinley are in no better situation than Sharpless was as against plaintiff's equitable right of set-off at the time the judgment was assigned to them. With reference to the assignment, a judgment is simply a chose in action, and the assignee takes subject to any defense or right of set-off, legal or equitable, which was available in favor of the judgment debtor as

against the assignor. *Fred Miller Brewing Co. v. Hansen*, 104 Iowa, 307; *Ballinger v. Tarbell*, 16 Iowa, 491; *Burtis v. Cook*, 16 Iowa, 194; *Marshall v. Cooper*, 43 Md. 46, 61.

Counsel for appellees insist that Harl & Tinley, taking by assignment without notice of any equities in favor of the plaintiff, are not subject to such equities. But this is not the general rule, nor is it the rule recognized by our statute. The assignee of a chose in action takes subject to all equities subsisting against the assignor in favor of the debtor acquired prior to the assignment, and the equities to which he is thus subject include the right of set-off. 2 Pomeroy, *Equity Jurisprudence* (3d Ed.), section 704. Thus it has been held that, although the assignment of a check or draft on a bank operates as an equitable assignment of the fund, the assignee is subject to the right of the bank to set off the indebtedness due from the drawer of the check to the bank on a note, even though the note is not matured. *Thomas v. Exchange Bank*, 99 Iowa, 202. And see *Nashville Trust Co. v. Fourth National Bank*, 91 Tenn. 336 (18 S. W. 822, 15 L. R. A. 710), in which case it is held that the right of equitable set-off existing in case of the insolvency of the creditor against whom such set-off exists may be maintained as to unmatured debts. The well-known exception in the case of negotiable paper, under which the transferee, even though he may not be a holder before maturity, is subject only to the equities pertaining to the instrument itself, and not to the general equities between the parties, such as the right of equitable set-off, does not apply to an ordinary chose in action, such as a judgment. *Hayes v. Clinton County*, 118 Iowa, 569. This equitable rule is recognized in Code, section 3461, which is as follows: "The assignment of a thing in action shall be without prejudice to any counterclaim, defense or cause of action, whether matured or not, if matured when pleaded, existing in favor of the defendant and against the assignor before notice of the assignment; but this section shall not apply to negotiable instruments transferred in good

faith and upon a valuable consideration before due." Prior to the adoption of this provision, substantially in its present form, as section 2546 of Code of 1873, there was some question as to whether a mere assignee of a negotiable instrument — i.e., one taking otherwise than by indorsement or delivery such as was necessary at common law to transfer the legal title to such instrument — was protected as against equities between the parties not inhering in the instrument itself; but since the adoption of that provision it has been repeatedly held that the assignee is subject, not only to defenses, but also to equitable rights of set-off existing in favor of the maker as against the assignor. *Hecker v. Boylan*, 126 Iowa, 162; *Bone v. Tharp*, 63 Iowa, 223; *Downing v. Gibson*, 53 Iowa, 517. And see *Younker v. Martin*, 18 Iowa, 143; *Stannus v. Stannus*, 30 Iowa, 448; *Shipman v. Robbins*, 10 Iowa, 208; *Richards v. Daily*, 34 Iowa, 427.

Counsel for appellees insist that as against Harl & Tinley the plaintiff is equitably estopped from interposing any set-off. The facts relied upon are that they were attorneys for Sharpless in procuring the original judgment against this plaintiff, and before prosecuting their appeal from that judgment to the Supreme Court took an assignment thereof in payment of their fees and rendered services in reliance upon said assignment, without knowledge of any claim of plaintiff against Sharpless. But in the absence of any allegation that plaintiff concealed from Harl & Tinley the existence of its claim against Sharpless, and induced Harl & Tinley to take the assignment and render the services by reason of their ignorance of the existence of such claim, we see nothing in the record on which the doctrine of equitable estoppel can be based. It is not the duty of the debtor to give notice of defenses or set-offs for the protection of his creditor's assignee; but it is for the assignee to ascertain what the relation between his assignor and the debtor actually is. The assignee must take the risk. Plaintiff could not interpose its counterclaim in the replevin

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suit, and it had no occasion to act after judgment in that suit was rendered until it was threatened with the enforcement of such judgment. Prior to that time, and indeed, prior to the final affirmance of the judgment in the Supreme Court, Harl & Tinley had taken the assignment on which they now rely. Certainly there is nothing in these facts to justify the claim of equitable estoppel. In no view of the case, therefore, is the right of Harl & Tinley by virtue of their assignment better than the right of Sharpless under his judgment; and, as already indicated, plaintiff was entitled to maintain, as against Sharpless, its action in equity to enjoin the enforcement of the judgment.

The decree of the trial court is therefore *reversed*.

CLARENCE H. JOHNSON, Proponent, v. JOEL JOHNSON, Contestant, Appellant.

Wills: UNDUE INFLUENCE: EVIDENCE. In the absence of substantive evidence the circumstances are held insufficient to show undue influence in the execution of a will.

Same: STATEMENTS OF TESTATRIX. The statements of a testatrix that she would not have executed the will but for the harassing annoyance and importunities of her husband are not competent in proof of the exercise of undue influence, but are admissible as tending to show the state of her mind.

Appeal from Sac District Court.—HON. F. M. POWERS, Judge.

MONDAY, APRIL 8, 1907.

HANNAH JOHNSON died leaving her surviving a husband, Lawrence Johnson, and their two sons, Clarence H. and Joel Johnson. Her will was filed for probate March 1, 1905, and by its terms gave all her property to Clarence for use during his life and upon his death to his children.

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It recited that no provision for Joel was made, "he having received his share of my property." Joel objected to the probate of the paper as the will of the deceased, on the ground that it was the result of undue influence exerted by his father upon the testatrix. The trial resulted in an order admitting the will to probate. The contestant appeals.—*Affirmed.*

W. A. Helsell, for appellant.

Tait & Jackson, for appellee.

LADD, J.—There was no substantive evidence that Lawrence Johnson, husband of the deceased, ever exerted any undue influence over her to induce the execution of the will.

1. *WILLS: undue influence: evidence.*

That its provisions were unequal when considered with reference to those having claims on her bounty may be conceded. When equality is intended, there is little or no occasion for the execution of a will. The law wisely secures equality of distribution when a person dies intestate. Testamentary disposition of property is seldom entirely satisfactory to all having claims to consideration. The infirmities of human nature are likely to be evidenced in the last testament, voicing the dictates of affection and enmity, the partialities and dislikes of the testator while living. But to all these he had a right, and if he chose might be unjust in the disposition of his property. See *Cauffman v. Long*, 82 Pa. 72; *In re Shell's Estate*, 63 Pac. 413 (28 Colo. 167, 53 L. R. A. 387, 89 Am. St. Rep. 181). If the provisions of a will are such as a person in a like situation and similar relationship would not ordinarily make, then this may be considered by the jury in connection with evidence that undue influence has been exerted, as tending to corroborate or confirm the claim that the will is the result of such influence rather than the voluntary act of the testator. This is on the theory that the instrument is such as would be likely to be so produced. But in the absence of any evi-

dence that the testator may have been induced to insert the odious provisions or execute the will by coercion, imposition or fraud, the mere fact that the terms of the instrument are unequal is without probative force. *Manatt v. Scott*, 106 Iowa, 216; *In re Townsend's Estate*, 122 Iowa, 246.

Nor is the circumstance that the husband requested the former will of the clerk after it had been deposited with him entitled to any consideration. This did not tend to show he was urging its destruction or modification, and the fact that thereafter it was procured on the order of the testatrix indicated that he was not unduly interfering with his wife's affairs. If he accompanied her when she executed the order for the recall of the former will, and when she executed that probated, these acts were not inconsistent with his privileges as husband. Indeed, had he gone farther and talked with her concerning the provisions to be inserted, this would have furnished no proof of coercion. *Perkins v. Perkins*, 116 Iowa, 253.

That the last will differed from the one previously executed was not evidence of undue influence. *Horn v. Pullman*, 72 N. Y. 269; *Rankin v. Rankin*, 61 Mo. 295; *Nelson's Will*, 39 Minn. 204 (39 N. W. 143). But where there is evidence that undue influence has been exercised such differences are proper for consideration, as tending to show that it has been effective on the mind of the deceased. On the other hand, the similarities of the two wills may be considered as indicating a fixed purpose on the part of the testator to dispose of his property as indicated, and therefore as raising an inference that the last will was not involuntary. *Thompson v. Ash*, 99 Mo. 160 (12 S. W. 510, 17 Am. St. 552). One witness testified that the deceased declared in the presence of her husband that the will did not express her wish, that she made it to please him, that it was not as she desired it, and that to this Johnson made no reply. At most, this was a circumstance tending to impeach Johnson's testimony, and amounted to no more than an admission by a per-

son not a party to the controversy. As such it was not admissible as substantive evidence. The declaration of the testator, however, was properly received as will hereafter appear. The facts and circumstances alluded to had no direct tendency to show that undue influence in fact had been exerted on the deceased with reference to the execution of her will.

II. The only evidence other than that mentioned was given by several witnesses who testified that deceased had declared in their presence that she would not have executed the will but for the harassing annoyance and importunity of her husband and that the will was not as she desired it. It is conceded that this evidence was admissible, as tending to show the condition of the testatrix's mind, i. e., the effect which may have been wrought upon it by the influence of her husband, if any he exerted. The controversy is as to whether these declarations should be considered in determining whether the undue influence had in fact been exerted upon the deceased. There is one case at least apparently so holding on the theory that the will was not a disposition of the property until the death of the testatrix, and therefore her declarations were admissible as substantive evidence. See *Sheehan v. Kearney*, 82 Miss. 688 (35 L. R. A. 102, 21 South 41). But the great weight of authority is in harmony with the decisions of this court in holding that declarations after the execution of the will reciting what had been done are mere hearsay and are not to be regarded as evidence of the facts stated. In early case of *Bates v. Bates*, 27 Iowa, 110, this court, after citing *Waterman v. Whitney*, 11 N. Y. 157 (62 Am. Dec. 71), holding that such declarations are not competent to prove the exercise of undue influence, announced an intention to follow that case, and it was said that "upon this question there was other and important substantive testimony besides the declarations proven. These declarations were competent to be received and considered in con-

nection with the substantive facts tending to establish the same issue." The distinction was also noted in *Stephenson v. Stephenson*, 62 Iowa, 163, and *Mannatt v. Scott*, 106 Iowa, 203. In *re Wiltsey's Estate*, 122 Iowa, 423, it was said was that "prior declarations of the testator are not evidence of undue influence," and in *re Townsend's Estate*, 122 Iowa, 246, the court expressly held that it was error to refuse an instruction to the effect that "evidence of the statements of the testator, made either before the will was made or after, or which tended to throw light on the condition of the mind, are admissible," but "the evidence of such statement is hearsay and incompetent and should not be considered," as tending to show that undue influence was in fact exerted. See also, *In re Townsend's Estate*, 128 Iowa, 621. This rule is universally laid down by text-writers. See Gardner on Wills, section 63; Underhill on Wills, section 161; Page on Wills, section 423; Schouler on Wills, section 244; Wigmore on Evidence, section 1738; and decisions too numerous for citation. Declarations of the testator are never received for the purpose of showing that such influence was exercised. See note to *In re Hess' Will*, 48 Minn. 504 (51 N. W. 614, 31 Am. St. Rep. 665), and 29 Am. & Eng. Ency. of Law, 117, for collection of cases.

Undoubtedly the statement of the deceased may be received as indicating his state of affections or dislike for particular persons benefited or not benefited by the will, of his inclination to obey or resist persons alleged to have exerted the influence, and, in general, his mental or emotional condition with reference to his being affected or influenced by any of the persons concerned. But as an account or recital of what in fact has occurred in the past, such evidence is no more than hearsay, and ought not to be received as tending to establish the facts related. The theory that these are admissible as declarations of party in possession of property is unsound, for they in no way tend to explain such possession or the nature of the title under which it is held.

See *Walkley v. Clarke*, 107 Iowa, 451. Ordinarily they are mere recitals of past and completed transactions having no relation to the possession of the declarant or the title under which it is held. Whether, as seems to be thought in *Sheehan v. Kearney, supra*, and by Mr. Wigmore in his work on Evidence, where evidence has been introduced tending to prove the exercise of undue influence, the fact that the testator has been unduly influenced may be considered in corroboration of such evidence is not involved in this case, for no such evidence was adduced.

It was not error to receive these declarations in evidence, for the order of proof is always very largely within the discretion of the trial court. As there was no substantive evidence, however, tending to establish the fact of undue influence, the error in striking such evidence from the record was without prejudice, as in any event the court must have directed the verdict for the defendant. The rulings are approved, and the judgment is *affirmed*.

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JENNIE BROMBERG, Appellant, v. EVANS LAUNDRY COMPANY, Appellee.

Master and servant: NEGLIGENCE: STATUTES. A female under the
1 age of eighteen years engaged in removing soiled muslin from the rollers of an ironing machine, while the same are in motion, and in replacing clean sheeting, is held within the provisions of section 4999b, Code Supplement 1902, prohibiting direction to such an employé to clean moving machinery.

Same: PLEADING. Directing a female under the age of eighteen
2 years to clean moving machinery is negligence *per se*, under the Statute; and a petition alleging that at the time of her injury plaintiff was under eighteen years of age and defendant negligently allowed her to do such work, is broad enough to permit an application of the Statute without a specific reference thereto.

Same: ASSUMPTION OF RISK. Under section 4999b, Code Supplement
3 1902, a female less than eighteen years of age is presump-

tively incapable of appreciating the dangers arising from the operation of machinery and will not be held to have assumed the risk incident thereto, unless the employer affirmatively shows that she had sufficient capacity to appreciate the risk, and this is a question of fact for the jury.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

MONDAY, APRIL 8, 1907.

ACTION to recover damages for personal injury. There was a directed verdict and judgment for the defendant, and plaintiff appeals.—*Reversed.*

Saunders & Stuart, for appellant.

Harl & Tinley and Green & Breckenridge, for appellee.

WEAVER, C. J.—At the time in question the defendant company was engaged in operating a steam laundry in the city of Council Bluffs, Iowa, in which establishment the plaintiff, a girl of seventeen years of age, was, and for several months had been, an employé. A part of the equipment of the laundry consisted of a mangle, or machine for ironing cuffs and collars. In this device three horizontal rollers or cylinders were employed. The middle cylinder was of smooth iron or steel surface heated by gas jets in its interior, while the upper and lower cylinders were of larger diameter and had their surfaces padded with several thicknesses of blanket over which were wound smooth muslin sheets. When the machine was in use the padded cylinders above and below revolved with their surfaces in close contact with the heated cylinder between them, the pressure being adjusted and regulated by the operator. In practical operation, one employé fed the collars and cuffs into the machine from one side while another employé received them on the other side and fed them back again until the desired pol-

ish was secured. At intervals of a few days the sheets covering the padded cylinders became soiled and scorched, necessitating their renewal. When the old cloth had been removed, the end of a new one was pinned in some manner to the blanket padding, and, the machine being put in motion, the sheet was wound around the cylinder. In doing this it was the duty of the operator to press her hands over the sheet and smooth out the wrinkles in order that the covering should go on evenly. This work, it is obvious, exposed the person performing it to more or less danger of having her fingers caught and drawn in between the cylinders. The machine was supplied with no guards or fenders to prevent such accidents. During the earlier part of her employment by the defendant, plaintiff was not employed upon or about the machine in question, but thereafter had on several occasions assisted in the ironing of collars and cuffs in the manner above described. She had also on several occasions assisted in removing the soiled covering of the padded cylinders and replacing them with new ones. On the day in question, February 7, 1903, the plaintiff and another employé, in the line of their duty as operators of this machine, undertook to change the muslin covering on the lower cylinder. In smoothing the new cover as it was rolled into place the fingers of one of plaintiff's hands were in some manner, which she cannot fully explain, drawn into or caught between the rollers, and before the machine could be stopped her entire arm including the elbow joint was badly crushed and bruised. By reason of the injury thus received, she was confined to her home for about three months, and the expense incurred for treatment, nursing, and medicine amounted to about \$150. At the time this action was begun plaintiff had arrived at her majority, and had taken an assignment from her father of his claims on account of her injury and of the loss and expense which he had thereby sustained.

The petition charges the defendant with negligence (1) in permitting or causing the plaintiff to engage in a work

for which by reason of her youth and inexperience she was wholly unfitted; (2) in providing for plaintiff's use a machine without guards or fenders to prevent injuries of this nature to its operators; (3) in failing to provide plaintiff a safe place to work, or suitable tools and appliances with which to do the work; (4) in carelessly and negligently ordering the plaintiff to operate said machine while she was of the age aforesaid, and too young and inexperienced to realize the dangerous character of such machine or of the work in which she was engaged; and (5) in failing to instruct plaintiff how to operate the machine or to point out its dangerous character. The defendant denies all negligence on its part, and alleges that the risks of the employment, including the work in which plaintiff was engaged when injured, were open and obvious and were assumed by her. The evidence tended to show the state of facts hereinbefore recited. At the close of plaintiff's case, defendant moved for a directed verdict in its favor on the following grounds: (1) That no actionable negligence had been shown on part of the defendant; (2) that the risk of injury of which plaintiff complains was assumed by her in her contract of employment; and (3) that it is affirmatively shown that plaintiff fully understood how to operate the machine, and the risk thereof was incident to the work she undertook to perform. This motion was sustained, and judgment entered accordingly. Plaintiff's motion for a new trial was also overruled.

I. As the ruling sustaining the motion to direct a verdict was general, we are required to consider whether it may be sustained upon either of the grounds assigned.

The first in order was the proposition that the evidence is insufficient to support a finding of negligence on part of the appellee. Passing other phases of this question, the appellant argues that the act of the appellee in permitting plaintiff to perform the work in which she was engaged when she received her injury constitutes a violation of the statute, Code Supp.

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utes.

1902, section 4999b, and was therefore negligent *per se*. This statute provides, among other things, that every owner, agent, superintendent, or other person in charge of a manufacturing or other establishment where machinery is used shall, if possible, provide such machinery with loose pulleys; properly guard all saws, planers, cogs, gearings, beltings, shaftings, set-screws, and machinery of every description; and shall neither permit children under sixteen years of age to assist in operating dangerous machinery, nor permit or direct any female under the age of eighteen years to clean machinery while in motion. To this contention it is objected first that plaintiff was not at the time of the accident engaged in cleaning the machinery. We do not think the objection well taken. The testimony of the plaintiff was to the effect that after being used for a while, the surface of the padded rollers would become scorched and dirty, rendering it necessary to remove the muslin surface cloth and put on a new one in order to avoid soiling the collars and cuffs which were being ironed. Now, if the surface of the middle of unpadded roller had become soiled by adhering starch or other foreign substance tending to injure the quality of the work produced, and plaintiff had undertaken to remedy such condition by applying a sponge or scraper to the face of such roller while in motion, it would hardly be contended that she was not in the strictest sense of the word "cleaning" the machine. We are unable to see in what material respect the work in which she was in fact engaged differs from that mentioned in the illustration. In the one instance the soiling material is deposited directly upon the surface of the roller, and in the other upon the surface of the sheet with which the roller is covered; and the sponging or scraping in the former case, and the putting on of a new sheet in the latter, are but different methods of accomplishing a like result, the cleaning of the machine.

Appellee further objects that the claim made in the petition is not broad enough to call for an application of the

statute to which we have referred. In stating her cause of action, the plaintiff's petition makes no direct or specific reference to the statute, and it is very possible in drawing it the pleader did not have that provision in mind; but we are inclined to the view that the facts pleaded are such as bring the case within the scope of the statute, and that, therefore, it is not material what view of the law counsel may have entertained in framing the declaration. He did allege in substance that plaintiff was at the date in question under 18 years of age, and that defendant was negligent in allowing her to do such work, and this we hold a sufficient allegation of actionable negligence under the statute. The plaintiff, being under the prescribed age limit, the act of the appellee in directing or allowing her to clean the machinery while in motion was negligence *per se*. *Burk v. Creamery Co.*, 126 Iowa, 734.

II. Does the record justify the court in holding as a matter of law that plaintiff had assumed the risk of the injury which she sustained? The answer to this question depends very largely upon the effect to be given to the statute already referred to. Neither of the cases cited by counsel for appellee (*Martin v. R. R. Co.*, 118 Iowa, 148; *Woolf v. Nauman Co.*, 128 Iowa, 261, is directly in point. The *Martin* case was based upon alleged negligence of the defendant in violating a city ordinance fixing a speed limit for trains within the corporate limits, and it was there held that the plaintiff, a man of adult years and an experienced brakeman, by continuing in the employment of the company with full knowledge of its habitual violation of the ordinance, and himself taking part in the operation of such train, had assumed the risk of injury thereby created. The court there calls attention to the fact that the ordinance in question was general in its nature, and the decision based thereon is therefore not controlling as to the application and effect of a statutory prohibition or regulation enacted for the protection of a particular class

2. SAME: pleading.

3. SAME: assumption of risk.

of employés. In the *Wolf* case the injured person was a minor within the protection of the factory act, and we held that the violation of its provisions was negligence *per se*; but the record was such as to make it unnecessary to decide whether, under any circumstances, such person could be held to have assumed the risk, and we expressly refrained from passing thereon.

It seems very clear to our minds that a distinction exists between a statute or ordinance enacted for the protection of the public generally and one, the primary purpose of which is to regulate or control the relations between employer and employé, and that a rule which would be clearly just and reasonable as applied to the former may not be so when applied to the latter. Especially is this true where the Legislature has designated or set apart a specific class of persons as being presumably incapable of exercising the judgment and care requisite to their reasonable safety, and forbidding absolutely their employment in certain specified lines of hazardous labor. This distinction was recognized by us in the *Wolf* case, where we said: "The statute is not a mere regulation as to manner in which appellant's business shall be carried on. It is an absolute prohibition of the employment of any boy of the age of the deceased, and public policy would seem to demand that the statute which undertakes to protect children against the hazards to which the recklessness and inexperience of childhood expose them shall not be defeated of its purpose by pleading that same childish recklessness and ignorance as a reason for exempting an employer from responsibility for his own wrong." Nor is this court alone in refusing to apply the doctrine of assumption of risk to an infant employé in a service which the statute prohibits, even though it be held applicable to an experienced adult who engages or continues in an employment with full knowledge that his employer habitually violates a statutory regulation enacted to secure or promote the safety of those engaging therein. For example, the courts of New York

have adopted to its fullest extent the rule affirmed by this court in the *Martin* case, *supra*. *Knisley v. Pratt*, 148 N. Y. 372 (42 N. E. 986, 32 L. R. A. 367). Without in any manner overruling that precedent, the same court has since held that where an employer violates a statute which prohibits the employment of young persons in certain kinds of labor, and the boy or girl receives an injury in such service and brings suit for the recovery of damages, the court cannot say as a matter of law that the plaintiff is chargeable with either assumption of risk or contributory negligence. *Marino v. Lehmaier*, 173 N. Y. 530 (66 N. E. 572, 61 L. R. A. 811). After discussing the apparent reasons which induced this legislation, the court says: "To our minds the statute in effect declares that a child under the age specified does not possess the judgment, discretion, care, and caution necessary for the engagement in such dangerous avocation, and is therefore not as a matter of law chargeable with contributory negligence, or with having assumed the risks of the employment." The record in that case is parallel with that in the case at bar. The trial court having held that proof of the employment of the plaintiff while within the age limit fixed by statute, and his injury in such employment, did not make a *prima facie* case for recovery of damages, the judgment of nonsuit was reversed on appeal. So, also, construing a statute less rigid than ours, the Supreme Court of Minnesota, which accepts the rule of the *Martin* case, in its application to adult plaintiffs, relying upon this violation of a statutory regulation as constituting negligence, lays down the rule that proof of a violation of a statutory prohibition in the employment of a boy or girl followed by injury to him or her in such employment makes a *prima facie* case for the recovery of damages, and that in such showing the court cannot hold the plaintiff chargeable as a matter of law with contributory negligence, or with having assumed the risk of such injury. *Perry v. Tozer*, 90 Minn. 431 (97 N. W. 137, 101 Am. St. Rep. 416).

The doctrine of assumption of risk is based upon the theory that the employé knows and appreciates the danger to which he is exposed, and, with such knowledge and appreciation, voluntarily elects to continue in the dangerous employment. If the statute in question has any justification, it is upon the theory that persons of immature years are incapable of properly appreciating the danger and protecting themselves against it. The State has a direct interest in the life, health, and safety of every individual citizen, and does not hesitate when the occasion requires to interfere for the protection of the weaker and less capable against the consequences of their incapacity. *Holden v. Hardy*, 169 U. S. 366 (18 Sup. Ct. 383, 42 L. Ed. 780). Unless we are to deprive the statute of all effective force, we cannot do less than apply to it the rule of these precedents, and hold that a person within the age limit thus fixed is presumptively incapable of recognizing or appreciating the danger attending this prohibited employment. It leaves open to the employer to show affirmatively, if he can, that the injured person, notwithstanding he or she was within the protected age, was yet in fact of sufficient capacity, strength, and judgment to recognize and appreciate the risks attendant upon that kind of labor, or arising from the known negligence of the employer, or that by a failure to exercise the degree of care which a person of his or her age, experience, and capacity ought to exercise, he or she contributed to the injury of which complaint is made. Whether the showing thus made overcomes the statutory presumption is for the jury and not for the court to determine.

Adopting this view, we are compelled to hold that the trial court erred in directing a verdict for the defendant. The case must be remanded for a new trial.

The judgment appealed from is *reversed*.

FRED JONAS, Appellant, v. MICHAEL WEIRES, CRAIG & RAY,
G. M. CRAIG and W. F. RAY.

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138	121
138	715

Wills: VESTED ESTATES: SALE ON EXECUTION. The interest of one

- 1 who takes a vested remainder under the terms of a will is subject to sale on execution before he comes into possession; and this rule is not affected by a provision in the will that when the devisees come into enjoyment the indebtedness of any one of them to another shall be paid out of his share before the remainder is paid over to him.

Justices of the peace: JURISDICTION. Under the provisions of
2 the Code of 1873, a Justice of the Peace acquired jurisdiction of a non-resident in the township of plaintiff's residence, where service was had in the county although in another township.

Same. Where there is no qualified Justice in the proper town-
3 ship the suit may be brought in an adjoining township, and as no record is required to be made of the fact, the statutory presumption that there was a valid reason for bringing it in the adjoining township obtains.

Execution sales: INADEQUACY OF PRICE. Where an effectual levy
4 cannot be made on an undivided interest in a portion of a tract of land, the fact that the value of the entire interest is greatly in excess of the judgment, will not show such fraud as to render a sale thereof void.

Appeal from Butler District Court.—HON. CLIFFORD P. SMITH, Judge.

TUESDAY, APRIL 9, 1907.

Action in equity to set aside a sheriff's deed to plaintiff's undivided interest in certain real property, and to quiet title in plaintiff to such undivided interest, as against defendants Craig & Ray, who claim to be owners thereof under such sheriff's deed. Decree for defendants, from which plaintiff appeals.—*Affirmed.*

N. W. Scovel and E. P. Andrews, for appellant.

Courtwright & Arbuckle and Geo. M. Craig, for appellees.

McCLAIN, J.—In 1886 the father of plaintiff died, leaving a will, hereafter set out, by the terms of which plaintiff was given some interest in a tract of land in Butler county, subject to a life estate in his mother, who survived the testator. Plaintiff, who had resided in Butler county in 1878, and had since that time been a nonresident of the State, returned temporarily to Butler county to attend his father's funeral, and there, on the 16th day of September, 1886, in Jefferson township of that county, was served with notice of an action brought before one Daggett, a justice of the peace in and for West Point township of that county, in which Weires, one of the defendants in this case, sought to recover judgment against him for \$14.90, with interest, on an open account. This plaintiff made no defense in that action, and judgment was rendered against him by Justice Daggett on the return day for \$22.10, with costs. A transcript of this judgment having been filed with the clerk of the district court of Butler county, execution was issued March, 1902, upon said judgment, at the request of Weires, and levy was made by the sheriff on the undivided one-fourth interest in the land referred to in plaintiff's father's will, which is the interest he now claims in said land as having accrued to him by virtue of the provisions of the will. On April 1, 1902, the interest thus levied upon as belonging to plaintiff was sold by the sheriff to said Weires for \$68.37, being the amount of the judgment, with interest and costs; the recital in the sheriff's return of the sale being that he exposed "to sale at public auction the property aforesaid to the highest and best bidder in forties, and, receiving no bids therefor, I then and there offered it as a whole, sold all the above-described real property, to wit, an undivided

one-fourth of," etc.—describing the land. Subsequently Weires assigned his certificate of sale to Craig & Ray, who had been his attorneys in the action before the justice of the peace, and on April 3, 1903, the sheriff made his deed in due form to Craig & Ray, for said undivided one-fourth interest. The grounds relied upon by plaintiff as entitling him to have the deed set aside are: First, that his interest under his father's will was contingent at the time of the levy and sale, and not subject to sale under execution; second, that the justice of the peace rendering the judgment under which the sale was had was without jurisdiction to render such judgment; and, third, that the sale was for a grossly inadequate consideration and fraudulent.

I. The interest of plaintiff in the property accrued to him under the following provisions of his father's will:

(1) I give, devise, and bequeath unto my beloved wife, Sophia Jonas, my entire property, both personal and real, of every kind and nature, during her natural lifetime after first disposing of sufficient to pay all of my just debts.

(2) And that at the death of my beloved wife, all the property devised or bequeathed to her as aforesaid, or so much thereof as may then remain unexpended, I give and bequeath to my four sons, William Jonas, Frederick Jonas, Charles Jonas, and Henry Jonas, to be divided equally between them and to their heirs and assigns forever.

(3) At the death of my beloved wife, and when final settlement of my estate is made, if either of my sons should be indebted to either of the others, I desire that such indebtedness should be paid out of said son's share before his portion is paid over to him.

The contention for plaintiff, with reference to the construction of this will, is that he, being the Frederick Jonas mentioned in the second paragraph thereof, had thereunder only a contingent estate, not subject to sale

1. WILLS:
vested estates:
sale on
execution. under execution, and that his interest did not become vested until the death of his mother

in March, 1905, which was after the sheriff's sale and deed,

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and that therefore the levy and sale were invalid. But an examination of the terms of the will leads to a contrary conclusion. The widow took only a life estate, with no power to dispose of the fee save for the payment of testator's debts. As the testator could only dispose by will of his property remaining after the payment of his debts, the practical effect was to give his widow a life estate, and provide for the distribution of the remainder to his four children and their heirs, and the provisions of the will indicate an intention to determine the rights of these four children by the very language of the instrument. There was no contingency remaining to be determined after the death of the widow. True enough, the testator says that, after the death of the widow, the property is given and bequeathed to be equally divided among such children. But such language is to be interpreted as referring to the use and enjoyment, and not to the vesting of the rights, *Archer v. Jacobs*, 125 Iowa, 476; *Shafer v. Tereso*, 133 Iowa, 342. If the language of the will had contemplated that only the survivors of the children named should share in the property after the death of the widow, then there would have been a contingent remainder to them, and in that event the rule announced in *Taylor v. Taylor*, 118 Iowa, 407, that a contingent remainder is not subject to sale under execution, would have been applicable.

But the language of this will does not indicate that only the survivors were to share in the property. Instead of directing the property to be divided between his children or their heirs, as in the Taylor case, the testator here directs that it is to be divided equally between them and their heirs. Even under the rule of construction adopted by the majority in the Taylor case, the will now before us must be construed as creating a vested, and not a contingent, remainder. As is said in that case: "If the gift is immediate, though its enjoyment be postponed, it is vested; but if it is future, and is dependent on some dubious circumstances through

which it may be defeated, then it is contingent." And the rule is recognized that "the law leans towards the vesting of remainders." Further, to the effect that the courts will construe an ambiguous provision as creating a vested, rather than a contingent, remainder or an executory devise, see: *Archer v. Jacobs*, 125 Iowa, 467; *Shafer v. Tereso*, 133 Iowa, 342; *Burleigh v. Clough*, 52 N. H. 267 (13 Am. Rep. 23); *Rumsey v. Durham*, 5 Ind. 71; *Doe v. Provoost*, 4 Johns. (N. Y.) 61 (4 Am. Dec. 249); *Moore v. Lyons*, 25 Wend. (N. Y.) 119; *Chapin v. Crow*, 147 Ill. 219 (35 N. E. 536, 37 Am. St. Rep. 213). The uncertainty which characterizes a contingent, as distinguished from a vested, remainder, is uncertainty as to the person or the event, and not as to the time of enjoyment. *Shafer v. Tereso*, *supra*; *Everitt v. Everitt*, 29 N. Y. 39, 75; *Beatty's Adm'r v. Montgomery's Ex'r*, 21 N. J. Eq. 324; *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365 (20 Atl. 497); *Manderson v. Lukens*, 23 Pa. 31 (62 Am. Dec. 312); *Heilman v. Heilman*, 129 Ind. 59 (28 N. E. 310); *Schuyler v. Hanna*, 31 Neb. 307 (47 N. W. 932). If futurity is annexed to the substance of the gift, the vesting is suspended; but, if it appears to relate to time of payment only, the legacy vests instantaneously, and words directing division or distributing between two or more objects at a future time are equivalent to a direction to pay. In *Wilhelm v. Calder*, 102 Iowa, 342, the devise was expressly to the children who should be living at a future time, and the conclusion reached in the case *In re Crane*, 164 N. Y. 71 (58 N. E. 47), is based on a similar construction of the terms which are employed in this will.

The conclusion just indicated, based on the language of the first and second paragraphs of the will, is not affected by the provisions of the third paragraph, expressing a desire that, when the other devisees come into enjoyment of their interests at the death of the widow, the indebtedness of any one of them to another is to be paid out of his

share before the remainder is turned over to him. Even if this direction created a charge on the interest of one of the devisees in favor of another, it would affect the amount by him to be realized, and not the time of the vesting of his interest. It is an uncertainty as to the person who is to take, and not as to the quantity or value of the interest which he takes, that characterizes a contingent, as distinguished from a vested, remainder. The purchaser would, of course, take it subject to this uncertainty, but he would take whatever the devisee would have taken, and the interest provided for is therefore vested, and not contingent. That it is only uncertainty as to the person who is to take, or as to the event on which the vesting of an interest is made to depend, that prevents a contingent remainder being salable under execution, see: *Archer v. Jacobs*, 125 Iowa, 467; *Taylor v. Taylor*, 118 Iowa, 407, 415; *Ducker v. Burnham*, 146 Ill. 9 (34 N. E. 558, 37 Am. St. Rep. 135); *Railsback v. Lovejoy*, 116 Ill. 442 (6 N. E. 504). That a vested remainder is subject to sale under execution, although there may be some uncertainty as to its value or amount, depending on the happening of future events, is well settled. See *Woodgate v. Fleet*, 44 N. Y. 1; *Arzbacher v. Mayer*, 53 Wis. 380 (10 N. W. 440). Counsel for appellant rely upon *McClain v. Capper*, 98 Iowa, 145. But that case is explained in *Taylor v. Taylor*, 118 Iowa, 407, 414, as holding that a devise of the remainder after a life estate to devisees named, or the survivors of them, creates in such devisees only a contingent interest, as it cannot be ascertained until the termination of the life estate who will be entitled to take as survivors. There is no escape from the conclusion that plaintiff's interest provided for in his father's will vested in him on his father's death, and was subject to sale on execution against him.

II. The validity of the judgment under which plaintiff's interest was sold is attacked on the ground that the justice who rendered such judgment had no jurisdiction of

plaintiff (defendant in that action). Under provisions of the Code of 1873 which were in force when the judgment was rendered, a justice of the peace had jurisdiction in general coextensive with his county, and, as against a defendant resident in the same county as that of plaintiff's residence, a suit might be brought either in the township where the plaintiff or the defendant resided, or in any other township of the same county in which actual service on the defendant was had. See sections 3507, 3509, 3510, of the Code of 1873, which are the same as sections 4476, 4478, 4479 of the present Code. By section 3512 of the Code of 1873 (incorporated in somewhat different language into section 4480 of the present Code), it was provided that "if none of the defendants reside in the State, suit may be commenced in any county, and township, wherein either of the defendants may be found." The contention for appellant is that this last provision made it obligatory that suit against the defendant who was a nonresident of the State should be brought in the township where he was found, and deprived the plaintiff of the right to institute the suit in the township of his residence, though he served the defendant in another township of the same county. This was not, we think, the legislative intent. There seems to be no reason for holding that a nonresident of the State, though served in the same county, should not be compelled to defend the suit brought in the township of plaintiff's residence. We think the plaintiff in the action before the justice of the peace had the right to institute the suit in the township of his residence, if he secured service on the defendant in that suit in another township of the same county, although such defendant was a nonresident of the State.

But, on another ground, we also reach the conclusion that the justice of the peace acquired jurisdiction. In section 3514 of the Code of 1873 (section 4482 of the present Code), it is provided that, if there is no justice in the

proper township qualified or able to act, the suit may be commenced in any adjoining township in the same county, and there is no requirement in section 3515 of the Code of 1873 (section 4484 of the present Code) that the reason for instituting the suit in another township shall be made a matter of record by the justice. Under section 3669 of the Code of 1873 (section 4648 of the present Code), it is provided that the proceedings of courts of inferior jurisdiction within the State "shall be presumed regular except in regard to matters required to be entered of record, and except where otherwise expressly declared." There is no question but that the plaintiff in the suit instituted before Justice Daggett might have proceeded before a justice of the peace in Jefferson township in which service on the defendant in the suit could be secured, and that, finding no justice qualified to act in that township, he might have brought his action before any justice of the peace in an adjoining township, and the presumption created by the statute requires us to assume that, if Daggett was a justice of the peace in an adjoining township, there was the statutory reason for bringing the action before him. *Church v. Crossman*, 49 Iowa, 444; *Brown v. Davis*, 59 Iowa, 641; *Little v. Devendorf*, 109 Iowa, 47; *Baker v. Jamison*, 73 Iowa, 698; *Chesmore v. Barker*, 101 Iowa, 576; *Schlisman v. Webber*, 65 Iowa, 114. The townships of Jefferson and West Point, in Butler county, have a common corner, but are not otherwise adjoining; but they are, by the fact of having a corner in common, "adjoining" townships, within the meaning of section 3514 of the Code of 1873. *Holmes v. Carley*, 31 N. Y. 289; *Jebb v. Chicago & G. T. R. Co.*, 67 Mich. 160 (34 N. W. 538). The judgment under which plaintiff's undivided interest in the land in question was sold on execution was therefore not void for want of jurisdiction in the justice to render it.

III. There was evidence introduced for plaintiff tending to show that, at the time of the execution sale, an undi-

vided one-fourth interest in the tract of land in question was worth \$2,000, and it is contended that the sale of an interest of this value for a judgment of \$22 in amount, inclusive of interest and costs, was for such a grossly inadequate consideration that it should be set aside for fraud. In general, inadequacy of consideration alone is not sufficient evidence of fraud to justify the setting aside of an execution sale on that ground. *Sheppard v. Messenger*, 107 Iowa, 717; *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634; *Sigerson v. Sigerson*, 71 Iowa, 476; *Equitable Trust Co. v. Shrope*, 73 Iowa, 297; *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140 (18 South. 938); *Bank v. Doherty*, 37 Wash. 32 (79 Pac. 486); *McCoy v. Brooks* (Ariz.), 80 Pac. 365; *Graffam v. Burgess*, 117 U. S. 180 (6 Sup. Ct. 686, 29 L. Ed. 839); *Clark v. Bell* (Tex. Civ. App.), 89 S. W. 38. In *Fortin v. Sedgwick*, 133 Iowa, 233, a sale under execution of a farm of 485 acres, worth \$30,000, for \$40.90, was set aside as fraudulent, although the proceedings were regular; but the ground for setting it aside was fraud in making an excessive levy, and in not bidding on a single tract when the land was offered by the sheriff in forty-acre tracts as required by law, it appearing that the value of any one of the forty-acre tracts in excess of incumbrances was ample to satisfy the judgment. In that case, *Cook v. Jenkins*, 30 Iowa, 452, is relied on, in which it was held that there was an excessive levy under a writ of attachment, and the sale was set aside on that ground. It is conceded in *Fortin v. Sedgwick*, *supra*, that mere inadequacy of the bid, without more, will not invalidate the sale, and the conclusion of the court was supported mainly on the ground that the levy was excessive, as the sheriff might have made a sufficient levy by resorting to any one of the forty-acre tracts included in the larger tract which was in fact levied upon. But the circumstances in the case before us are wholly different. The plaintiff had only an undivided interest in the

4. EXECUTION
SALES:
inadequacy
of price.

tract of land involved, and this interest was subject to a life estate. It would have been impossible for the sheriff to levy upon and sell plaintiff's undivided interest in a portion of the tract, for plaintiff was not seised as a tenant in common of an undivided interest in each of the parcels, but only an undivided interest in the whole. A tenant in common may make a valid sale of an undivided fraction of his undivided interest, but he cannot sell his interest, or any portion thereof, in a part of the premises by metes and bounds, because this would interfere with his co-tenants' right of partition, and for this reason an execution sale of the interest of a tenant in common in a portion of the premises subject to the common ownership cannot be made. *Farr v. Reilly*, 58 Iowa, 399. And see *Laraway v. Larue*, 63 Iowa, 407.

It may be said that the assumption in the case of *Farr v. Reilly*, *supra*, as to the invalidity of a conveyance by one co-tenant of his interest in a part of the property owned in common, is not in harmony with the general current of the authorities, although it accords with the cases cited in the opinion; but the weight of authority is with the proposition that such a conveyance is valid by way of estoppel as against the grantor, though voidable or subject to be defeated if prejudicial to the interests of the co-tenants. In other words, the grantor cannot bind a court of equity in making partition to set aside to his grantor a share of a particular parcel, nor can such purchaser insist on the enjoyment of an interest in that particular parcel as against the other tenants in common; but if the other tenants should consent to the conveyance, or the court should set aside as a part of grantor's share the portion of the common property to which his conveyance relates, neither the grantor nor the grantee can complain. As supporting this general view, see *Frederick v. Frederick*, 219 Ill. 568 (76 N. E. 856); *Barnes v. Lynch*, 151 Mass. 510 (24 N. E. 783, 21 Am. St. Rep. 470), and note; *Benedict v. Torrent*, 83 Mich. 181

(47 N. W. 129, 11 L. R. A. 278, 21 Am. St. Rep. 589), and note; *Kenoye v. Brown*, 82 Miss. 607 (35 South. 163, 100 Am. St. Rep. 645), and note; *Worthington v. Staunton*, 16 W. Va. 208; *Ballou v. Hale*, 47 N. H. 347 (93 Am. Dec. 438); *Gates v. Salmon*, 35 Cal. 588 (95 Am. Dec. 139).

But, whatever may be the correct view as to a voluntary conveyance, there is no reasonable question under the authorities that an execution creditor is not bound to levy upon or buy in his debtor's interest in a part of the property in which his undivided interest exists. Evidently the execution creditor is not required to take his chances as to an objection by co-tenants, or the possible action of a court of equity in setting off to the debtor that part of the common property in which the creditor has purchased a share. *Whitton v. Whitton*, 38 N. H. 127 (75 Am. Dec. 163); *Porter v. Hill*, 9 Mass. 34 (6 Am. Dec. 22); *Blossom v. Brightman*, 21 Pick. (Mass.) 283; *Smith v. Benson*, 9 Vt. 138 (31 Am. Dec. 614); *Swift v. Dean*, 11 Vt. 323 (34 Am. Dec. 693); *Champau v. Godfrey*, 18 Mich. 37 (100 Am. Dec. 133); *Butler v. Roys*, 25 Mich. 53 (12 Am. Rep. 218); note to *Smith v. Huntoon*, 23 Am. St. Rep. 646; Freeman on Co-Tenancy (2d Ed.), section 216.

In this case there was not therefore an excessive levy, for the sheriff could not have made an effectual levy on plaintiff's undivided interest in a portion of the tract; nor was there any fraud on the part of the purchaser in not bidding upon plaintiff's interest in one of the forty-acre tracts, in which, as appears by the sheriff's return, the property was first offered, without securing a bidder, before the interest in the entire tract was offered and sold. The sheriff could not properly offer for sale plaintiff's undivided interest in one of the forty-acre tracts, nor could the purchaser have properly bid under such an offer. Where the property is not capable of division, the fact that the value of the property is greatly in excess of the amount of the judgment under which it is

sold does not show fraud. *State Savings Bank v. Shinn*, 130 Iowa, 365; *Peterson v. Little*, 74 Iowa, 223.

The holder of a judgment is not to be deprived of his right to satisfy his judgment out of the property of the judgment debtor, because the only property which he can find is an indivisible parcel greatly exceeding in value the amount of the judgment; nor is there any fraud in bidding only the amount of the judgment and costs. It is for the interest of the judgment debtor that a sale is for as small an amount as possible, sufficient to satisfy the judgment, for he is thereby enabled to redeem it by paying the amount of the judgment and costs. Where the proceedings are in every way regular, no fraud is to be imputed to the purchaser in exercising his legal right to subject the property of his debtor to the payment of the debt. Fraud must be proved, and cannot be presumed from the mere exercise of a legal right.

It is to be noticed also, with reference to the claim of inadequacy of the consideration for the sale of plaintiff's interest, that such interest was subject to an existing life estate, the value of which could not be directly ascertained. The purchaser took subject to the life estate, and subject also to the contingency, apparent if not real, that plaintiff might be indebted to his brothers at the termination of the life estate, and that an effort might then be made to subject his interest to the payment of such indebtedness. Whether the third paragraph of the will in fact created a lien on the interest, which plaintiff might become possessed of on the termination of the life estate, is immaterial. The purchaser would take subject to at least a possibility of a claim that the interest was thus incumbered, and he could not be required to estimate the value in the face of a possible lawsuit.

It is further contended, however, that there were other circumstances which, in connection with the inadequacy of the consideration, tended to show a fraudulent purpose on the part of the defendants to acquire plaintiff's interest in the

property for a small consideration. It is said that plaintiff's brother-in-law lived in the town of Allison, the county seat, and that the sheriff published the notices of the sale in newspapers published in two other towns in the county, and not in a newspaper published at Allison; and that of the three posted notices of the sale only one was posted in Allison, at the courthouse, and the other two in other places in the country. But it is to be remembered that the plaintiff was not a resident of the county, and there is no reason to assume that defendants knew anything about the relation of the brother-in-law to the plaintiff; nor, if they knew of such relation, that they assumed that notice to the brother-in-law would reach the plaintiff. The sheriff testifies that he gave notice by posting and publication in the usual way, and there is not the slightest evidence of any intention on his part or on the part of the defendants to avoid information reaching plaintiff as to the proposed sale of his interest. Something is said also as to defendants' attempts to collect the claim before bringing suit, and while plaintiff was residing in Minnesota, by sending it to an attorney in Minnesota at a place other than plaintiff's residence, when there was an attorney at the place of his residence to whom it might have been sent. But, as defendants were under no obligation to make an effort to collect their claim in Minnesota before instituting suit thereon when the opportunity arose by the visit of plaintiff to Butler county, we cannot see the least significance in the fact relied upon. If defendants had desired to conceal from plaintiff the fact of the existence of the claim, they would not have sent it to Minnesota for collection.

Finding no circumstance other than that of the inadequacy of consideration to indicate any fraud in the sale, and that the proceedings were in every way regular and proper, the lower court was justified in refusing to set aside the sale on the ground of fraud. Appellant's motion to

strike a portion of appellees' amended abstract, submitted with the case, is overruled.

The judgment of the trial court is therefore *affirmed*.

MARY C. RYAN, Appellant, v. JAMES W. PAGE.

Brokers: COMMISSIONS: EVIDENCE. In an action for commission
1 for procuring a purchaser for land, where the land was purchased by one claiming to have bought on his own account, evidence tending to show that the purchaser ascertained from another that the land was for sale is admissible.

Same: RECOVERY OF COMMISSION. An agent who contracts to find
2 a purchaser for land within a given time and for a stated commission must comply with his contract before he can recover; and a sale by his principal to his prospective purchaser at a less price will not authorize his recovery, where it is shown that such purchaser would in no event have paid more.

Appeal from Clarke District Court.—HON. H. M. TOWNER,
Judge.

TUESDAY, APRIL 9, 1907.

ACTION for a commission alleged to have been earned in finding a purchaser of land. Trial to jury resulted in verdict and judgment for the defendant. The plaintiff appeals.—*Affirmed*.

Stivers & Slaymaker, for appellant.

Temple, Hardinger & Temple, for appellee.

LADD, J.—This action is for a commission alleged to have been earned by plaintiff's assignor, John H. Ryan, in finding a purchaser of defendant's farm of one hundred and twenty acres. The case has been here before (123 Iowa, 246), and, on this appeal, but two errors are assigned — one

relating to the admissibility of evidence, and the other to an alleged defect in an instruction. The witnesses agreed that there was a contract of agency; the only dispute being as to whether a purchaser was to be found within "a few days" or "to-day or to-morrow" at \$37.50 per acre, and whether the commission was to be \$1 per acre, or mention of it was omitted. Owing to this latter difference, the petition was in two counts—one demanding compensation as agreed, and the other on a *quantum meruit*. Ryan testified that a day or two before the agreement of agency he had spoken with Hutchinson, who subsequently purchased the land of defendant, about buying it, had given him a description, and stated the price as above, and had promised to go with him to look at it, and, further, that he had informed defendant that Hutchinson was the purchaser he had in mind. Though Ryan insists that he rendered all the assistance possible in inducing Hutchinson to purchase, the latter testified that he examined the land on his own account; that Ryan had not priced the farm to him, nor had he anything to do with his going to look at it; that he had in fact told him that the land was rough, and he would not care for it. Defendants sold the property to Hutchinson at \$36 per acre.

I. As bearing on the contention that Hutchinson's attention was not directed to this land by Ryan, Lochrie was allowed to testify, over objection, that the farm had been

listed with him, and that about two months
1. **BROKERS:**
commissions: before the sale he had informed Hutchinson
evidence. that it was for sale and tried to induce him to

go and examine it. The evidence was admissible. It tended to explain how Hutchinson ascertained that the farm was for sale and came to negotiate with the defendant for its purchase and to show that this was brought about through influences other than those exerted by Ryan.

II. A purchaser was to be found within a time fixed by the parties and at a specified price, and, in order to earn

his commission, it was incumbent on the plaintiff's assignor to produce a purchaser for the land within the time stipulated, who was ready, able, and willing to buy the land at the price agreed upon.

2. SAME:
recovery of
commission.

The court specifically so instructed in the sixth paragraph of the charge, but it is argued that this was error for two reasons: (1) In not incorporating a clause to the effect that if defendant reduced the price with intent to avoid the commission he thereby waived the condition as to price in his agreement; and (2) that the instruction is in conflict with the third paragraph of the charge. The evidence was not such as to justify the modification suggested. Hutchinson testified that he would not have paid to exceed \$37 per acre for the land, and this was not contradicted by any of the evidence introduced or circumstances proven on the trial. Now it was incumbent on the plaintiff's assignor to produce a purchaser ready, able, and willing, not only to buy, but to pay the price specified, and, unless he did so, he was not entitled to the commission; if, however, he did produce such a purchaser, and the defendant, knowing the fact, refused to sell or sold at a lesser price, then the agent was entitled to recover compensation, for he had performed fully his part of the contract. This is no more than saying that an agent for the sale of land must comply with the terms of his agency before he can be said to have earned his commission, and that, until he has complied therewith, he cannot recover. *McArthur v. Slauson*, 53 Wis. 41 (9 N. W. 784), repeatedly cited by this court with approval, is directly in point. There, according to defendant's claim, the agent was to receive a commission if he found a purchaser for certain securities at a price equal to, or greater than, the face value. Such value was \$12,800, and the sale was made for \$11,000. The trial court instructed the jury that if the agent informed his principal before the sale that the buyers were the men he had found to purchase the securities, and with such knowledge he sold them at less than their face value, this

would be a waiver of the stipulation as to price. This was held to be error, and it was said that the jury should have been told that, as the agent had contracted to produce a person able and willing to purchase the securities, at their face value, he must have produced such a purchaser in order to recover, and if he did so, and defendant with knowledge of the fact, sold the securities at a less sum, this would amount to a waiver on his part of the stipulation as to price in the original contract. In other words, it was a part of the contract that the purchaser should be able and willing to pay a price specified, and the finding of such a purchaser was a condition precedent to the right to recover the stipulated commission. To hold otherwise would deny to parties the right to make their own contracts, and insist upon performance according to their terms. As the evidence utterly failed to show that Ryan had produced a purchaser able and willing to pay \$37.50 per acre, as stipulated in the contract of agency, the court rightly declined to incorporate the clause mentioned in the instruction.

It may be that this instruction is inconsistent with the third paragraph of the charge; but as that, under the rule as stated, was more favorable to plaintiff than it should have been, there was no prejudice. — *Affirmed.*

D. L. SWANEY and EARL CATON, Appellants, v. JOHN G. ALSTOTT.

Sales: RECOVERY OF PURCHASE PRICE. Where the contract for the sale of a stallion provided for payment of the purchase price wholly from service fees, the death of the horse without fault of the purchaser relieved him from making further payment.

Appeal from Greene District Court.—HON. Z. A. CHURCH,
Judge.

TUESDAY, APRIL 9, 1907.

SUIT on a written contract of sale. Trial to a jury, and a judgment for the defendant. The plaintiffs appeal.—*Affirmed.*

Chas. C. Helmer and W. C. Saul, for appellants.

Howard & Howard, for appellee.

SHERWIN, J.—The plaintiffs sold the defendant a stallion for the sum of \$435, and entered into a written contract of sale, the material portions of which are as follows: “On June 1, 1904, the said party of the second part is to pay two-thirds of all the above stallion’s service fee for the season of 1903, not however to exceed the sum of \$150 in addition to the interest on the entire debt to June 1, 1904. On June 1, 1905, the said party of the second part is to pay the same as above specified and, on the 1st day of June thereafter, the party of the second part is to pay the same as above specified until the entire debt is fully paid.” “At the close of each season’s stand with said horse, the books and accounts of said horse are to be deposited in the City Bank, Jefferson, Iowa, and said fees and accounts are to be assigned to the parties of the first part as security for the above payments as they mature and become due, and, when said service fees are collected, they are to be applied towards said payments. The ownership of said stallion shall be and remain the property of the first party until the debt is fully paid.” The written contract also provided that the purchase price of the horse should draw interest at the rate of 5 per cent. per annum, payable annually on the 1st day of June until the debt was paid. The case was tried on a stipulation as to the facts, from which it appears that the contract was made as alleged; that the horse earned for the year 1903 an amount of money which was duly accounted for to the plaintiff; and that he died in the fall of 1903 without any fault or negligence of the defendant, and while in

his possession. This suit is on the contract; the plaintiffs relying upon the proposition that there was a conditional sale to the defendant, and that, because thereof, he is liable for the balance of the unpaid purchase price, notwithstanding the fact that the earning capacity of the horse was ended by his death. On the other hand, it is contended that the sale was not such a conditional sale as to entitle the plaintiffs to recover, and that, whether the transaction be treated as a conditional sale or as a bailment, the defendant is not liable because of the exceptional conditions of the contract sued on. It will be noticed that the contract contains a clause reserving the title and ownership of the horse until full payment therefor was made. This was a "conditional sale" as the term is ordinarily understood, and, for the purposes of the sale alone, the absolute title would not pass thereunder until the conditions subsequent thereto had been performed.

While there is a conflict in the authorities as to whether there can be a recovery for property sold and delivered, on condition that the title shall not pass until full payment therefor has been made, when, without the fault of the purchaser, the property is destroyed before the purchase price falls due, and we do not determine the question in this case, the following cases, and others, hold that "the loss follows the title," and relieves the vendee from further liability, on the ground that the consideration for his promise has failed: 6 Current Law, 1382, and cases cited; 1 Mechem on Sales, section 634; *Bishop v. Minderhout*, 128 Ala. 162 (29 South. 11, 52 L. R. A. 395, 86 Am. St. Rep. 134); *Cobb v. Tufts*, 2 Wilson, Civ. Cas. Ct. App. section 153; *Mountain City Mill Company v. Butler*, 109 Ga. 469 (34 S. E. 565); *Randale v. Stone*, 77 Ga. 501; *Swallow v. Emery*, 111 Mass. 355; *Jones v. Brewer*, 79 Ala. 545; *Grant v. U. S.*, 7 Wall. (U. S.) 331 (19 L. Ed. 194); 1 Benjamin on Sales, sections 422, 427; 24 Am. & Eng. Enc. 1046.

But, aside from the rule relative to conditional sales,
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we are of opinion that the peculiar terms of the contract in suit would alone preclude a recovery by the plaintiffs. The contract does not in express terms contain an absolute promise on the part of the defendant to pay \$435. Its terms are that he was to pay the money from the earnings of the horse, except the matter of interest provided for, which he was bound to pay in any event. The contract specifies the amount that shall be paid on the 1st day of June of each year until the amount is paid, thus giving him an indefinite time for the payment of the price; after June 1, 1905, the time of payment depending solely on the earning capacity of the horse. It is, of course, competent for the parties to contract as they will, and, in this case, the contract will bear no other construction than that the parties intended the price to be entirely paid from the service fees of the horse, and, such being the case, we think there can be no doubt that the defendant is not liable beyond the proportion of these fees which he had agreed to pay. The case is not parallel with the cases cited, wherein there was an agreement to pay in specific property or specific services, and there was a failure to do so. The difference between those cases and the case at bar is to be found in the fact that here the payment was to be made from the earnings of the very property for which it was due, and, it being shown by the record that the death of the horse and the consequent loss of his earning capacity were in no wise chargeable to the fault or neglect of the defendant, it is manifest that there should be no recovery under the terms of the contract.

The judgment of the district court was therefore right, and it is *affirmed*.

W. S. FOSTER v. CHICAGO, ROCK ISLAND & PACIFIC RAIL-
WAY COMPANY, Appellant.

New trial. The ruling on a motion for new trial, in a personal
1 injury action, based on a contention that the testimony of
plaintiff was contrary to the physical facts will not be dis-
turbed on appeal, where the jury found that plaintiff's evidence
was entitled to belief, and from the evidence offered to the
motion and a personal test the court found that it did not
involve a physical impossibility.

Personal injury: EXCESSIVE DAMAGES. A verdict for \$8,500 for in-
2 juries received by plaintiff, fifty years of age and earning
\$9 per week, which resulted in a permanently crippled condi-
tion and pain and greatly reduced earning capacity is held not
excessive.

Appeal from Cass District Court.—HON. W. R. GREEN,
Judge.

TUESDAY, APRIL 9, 1907.

SUIT to recover damages for a personal injury. Trial
to a jury, and verdict and judgment for the plaintiff. The
defendant appeals.—*Affirmed.*

Carroll Wright, J. L. Parrish, and J. B. Rockafellow,
for appellant.

H. M. Boorman and Willard & Willard, for appellee.

SHERWIN, J.—This case has once before been here on
appeal, and it will be found reported in 127 Iowa, 84, where
a statement of the facts may be found. But three points
are made by the appellant on this appeal.

1. NEW TRIAL.

It is first contended that the defendant's mo-
tion for a new trial should have been granted, on the ground
that the plaintiff was guilty of misconduct in introducing

false testimony. The plaintiff was run over by a hand car. He testified that while standing on both feet on the car, and after having lost his balance by the inclination of his body backward, he sprang backward from the car and alighted six feet in front thereof, and then staggered backward several feet further before the car overtook him. The appellant contends that such testimony is not only contradicted by his former testimony in the case, but is a physical impossibility of which the court should take judicial notice. It must be conceded that his testimony on the present trial was not exactly the same as the testimony given by him on the former trial, but there is not such a variance therein as to warrant us in saying that the testimony on either one of the two occasions was false. The entire matter was before the trial jury and it was for it to determine whether the plaintiff's testimony was entitled to belief under all the facts and circumstances proven. They found that it was entitled to consideration and we are not disposed to interfere with such finding.

The appellant's contention that it was a physical impossibility for the plaintiff to make the leap backwards as testified to by him, and that the court should take judicial notice thereof is not supported by the record. In support of the motion for a new trial on this ground, and in the plaintiff's resistance thereto, the trial court had before it conflicting affidavits as to the possibility of making such a flying trip, not only this, but the trial judge gave the matter a thorough personal examination and a personal test; and, in a written opinion filed in the case by him, he announced his firm conviction that such a leap might be made by a member of the judiciary as well as by an ordinary layman, and that its accomplishment was not nearly so difficult as pretended by the appellant. We have not made any personal experiments along this line, being content for the purposes of this case to accept the conditions as presented by the record, and to say that we cannot judicially determine

that the leap backward was a physical impossibility. The appellant contends further that the court misdirected the jury in its eighth instruction, but a careful reading of the entire instruction does not warrant the construction placed thereon by the appellant, and we find no error therein.

The verdict in this case was for \$8,500, and the appellant strenuously insists that the recovery is so grossly in excess of the amount to which the plaintiff showed himself

2. PERSONAL
INJURY:
excessive
damages.

entitled as to indicate passion and prejudice on the part of the jury. The verdict is larger, perhaps, than in cases of this general nature, but the record shows without conflict that the plaintiff was very seriously injured, and that he suffered physically for many weeks on account thereof. One of his legs was broken, several ribs were broken, one lung was penetrated by a broken rib, his head was severely cut and injured and he received still other injuries. At the time of the trial he was about fifty-one years of age, and his expectancy of life was then about twenty-one years. Before his injury he was capable of earning and did earn about \$9 a week and, since he has so far recovered as to be able to resume work, he has been earning about one-half that amount. Taking all of the facts and circumstances into consideration, we are disposed to say that, while the verdict is somewhat in excess of the usual allowance in cases of this kind, we do not think that it is so excessive as to indicate passion and prejudice on the part of the jury. It is always difficult to estimate the amount that will fairly compensate an injured party for the pain and suffering both physical and mental that have been and will be suffered on account of such injuries, and the courts are reluctant to disturb the finding of a jury on this question unless it clearly appears that there was no warrant in the evidence for such finding. As we have heretofore said, the plaintiff's injuries were very severe. His pain and suffering must necessarily have been great. He is left in a crippled physical condition, and, as we

read the record, he is still subject to physical pain on account of such injuries. Considering all of these matters we are of the opinion that the verdict should not be disturbed.

The judgment is therefore *affirmed*.

LAURA B. SMITH, ET AL., Appellees, v. GEORGE REDMOND,
Appellant.

GEORGE REDMOND, Appellant, v. SIDNEY SMITH, ET AL,
Appellees.

Contract for exchange of land: RESCISSION: FRAUD: EVIDENCE.

- 1 The evidence in an action to rescind a contract for an exchange of properties is reviewed and held sufficient to show that the same was procured by the false representations of one of the parties, who, while representing himself as an agent was in fact a beneficial owner.

Rescission: DECREE. Upon rescission of a contract for the exchange of lands the decree should place the parties in *statu quo*.

Intervention. A claim of title by a third party will not be tried on a petition of intervention in a suit to foreclose a mortgage.

Appeal from Linn District Court.—HON. J. H. PRESTON,
Judge.

THURSDAY, JULY 12, 1906.

Rehearing denied, Thursday, April 11, 1907.

THE opinion states the case.—*Affirmed*.

Jamison & Smith, for appellant.

Main & Griffiths, for appellees.

WEAVER, J.—At the time of the transaction in controversy the appellees, Sidney Smith and his wife, Laura B.

Smith, were the owners of certain residence property in the city of Cedar Rapids, Iowa, which they valued at from \$5,000 to \$5,500, and the appellant was a real estate dealer of the same city. The latter having advertised a tract of land for sale or exchange, Smith made inquiry concerning it, and was informed by appellant that one M. S. Hayner had a sixty acre tract which he wished to sell or exchange for a residence in the city. At the time the sixty acres of land was incumbered by mortgage to the extent of \$1,500, and the residence property was also incumbered to the extent of \$500. After some negotiation an exchange was effected on terms by which the Smiths undertook to pay both mortgages and give additional boot money in the sum of \$500. On coming to make the exchange of title papers it appeared that the title to the sixty acres was neither in the appellant nor in Hayner, whom he professed to represent; but one of them held an unrecorded deed thereof executed by one A. H. Knapp, a former owner of the land, in which deed the name of no grantee had been inserted, and the transfer to Smith was effected by writing his name as grantee in the conveyance made by Knapp, while at the request of appellant and the said M. S. Hayner the conveyance of Smith and his wife was made to blank grantee, which blank was afterwards filled out with the name of one R. C. Hayner, who had no apparent interest in the deal. Shortly thereafter said R. C. Hayner conveyed the Smith property to appellant for the expressed consideration of "one dollar and exchange of property." In closing up the exchange, and in order to remove the \$500 mortgage on the residence property and to pay the agreed boot money of \$500, appellant advanced or claimed to advance for Smith \$1,000, for which amount Smith and wife gave him a second mortgage on the land to which they were taking title. A little later the Smith's instituted this action in equity, alleging that they had been induced to make conveyance of their said residence property by fraud and misrepresenta-

tions on part of appellant, and demanding a rescission of the exchange. To that end they tender a reconveyance of the sixty acres of land and ask that the title to their former homestead be restored and quieted in them against the claims of the appellant.

The appellant denies the allegations of fraud and misrepresentation, and insists upon the entire fairness and validity of the transaction. Pending this action, appellant brought suit to foreclose the mortgage for \$1,000 to which reference is above made. The appellees resisted the foreclosure, setting up the same alleged fraud pleaded in the suit for rescission as hereinbefore shown. In the first case the district court found for the Smiths, decreeing a rescission of the exchange, and restoring to them the title to their Cedar Rapids property as prayed, subject, however, to a lien of \$500 in favor of the appellant on account of the mortgage which appellant had paid off or caused to be released, which sum the appellees were required to pay within one year from the date of the decree. In the foreclosure action the court also found for the Smiths and dismissed the petition. Redmond appeals from the decision of the court in both cases, and the Smiths have also appealed from that provision of the decree which establishes the lien upon their homestead.

We shall not take the time to go minutely into the history of the transaction, but will say we are abidingly satisfied with the justice of the conclusion reached by the trial court. While appellant posed as a mere agent for Hayner, and as having no interest in the deal, save to earn an agent's commission, there is not room for reasonable doubt that he was the owner of the beneficial interest in the land, and that the Hayners were simply the instruments employed by him to obtain a better and more profitable bargain than could have been procured by an open, frank statement of the truth. It was he who made the trade by which Knapp disposed of the land.

1. CONTRACT FOR
EXCHANGE
OF LAND: re-
scission:
fraud:
evidence.

Though offered the property at \$65 per acre, he had the consideration entered in the deed at \$75 per acre, and later, in order to suitably impress Smith with the bargain he was offering, erased the figures and wrote in the consideration at \$100 per acre. There is, of course, some dispute about the representations made, but there is an air of candor and truthfulness about the story told by the Smiths which is by no means apparent in the version given by the appellant and Hayner. We are satisfied that appellant represented to the Smiths that Hayner had paid \$100 per acre for the land, and that an alleged lease of the land for \$5 per acre, which was used to add attractiveness to the bait, was padded for trading purposes. It is shown to a reasonable certainty that the land was not worth to exceed about \$4,000; but by the methods pursued to bring about the trade the Smiths were induced to believe they were getting property worth from \$6,000 to \$7,500. Some of the representations could well be passed as mere expressions of opinion, but with them were representations of fact on which the appellees could properly rely.

Moreover, it is quite clearly shown that at the time of this deal Mr. Smith was in a physical and mental condition, the particulars of which we need not here repeat, which, if not amounting to actual incompetence for a business transaction of this nature, did render him peculiarly liable to be overreached by a person disposed to take advantage of it. A further significant circumstance is found in the closing phrase in the written contract (prepared by the appellant) for the exchange, which reads as follows: "There are no other agreements or representations relied upon by either of the parties other than the agreements and stipulations herein contained." It would be going too far to say that this provision in a contract is in itself a confession of fraud on the part of the one who exacts it; but it is entirely just to say that it manifests a degree of caution which is unusual among honest men dealing with each other in perfect candor, and

is sufficient, in our judgment, to justify the court in examining with much care into the good faith of any transaction which it has been thought necessary to hedge about with such an agreement.

There are other features of the case not without material bearing upon the issues, but they involve questions of fact only, and we pass them with the simple statement that as a whole they tend to sustain the conclusion already indicated. That the Smiths were grossly misled to their injury by the representations of the appellant and his assistants we are entirely satisfied, and therefore unhesitatingly uphold the decree of the trial court for a rescission of the contract. We also agree that the order establishing a lien in appellant's favor is right. The debt secured upon the homestead at the time of the exchange was the debt of the Smiths, and rescission should be so ordered that they may be placed in *statu quo*—no better and no worse than the position they occupied before the exchange. This is what the decree below effects, and it must be affirmed on both appeals. It follows from the foregoing that the denial of appellant's petition for foreclosure must also be affirmed.

We have omitted to state that Knapp, from whom appellant or Hayner obtained the sixty acres, sought to intervene in the foreclosure proceedings and claim title to the land. His petition was stricken on motion of the appellant, on the theory that his claim of title could not properly be tried upon such intervention. From this ruling Knapp has also appealed, but we are disposed to hold that the trial court did not err in this respect, and that, if the intervener has any valid claim to the title, he should bring a separate action to enforce his rights.

On all the appeals the decree of the district court is affirmed.

LOUISA C. BEECHLEY, v. NATHANIEL K. BEECHLEY, Appellant.

134	75
137	170
134	75
142	703

Husband and wife: CONVEYANCES BEFORE MARRIAGE: FRAUD: EVIDENCE. The general rule is that a voluntary conveyance made with intent to defraud the party who subsequently becomes the husband or the wife of the grantor is void, whether the future spouse was selected at the time of the conveyance or not. Overruling the case of *Gainor v. Gainor*, 26 Iowa, 337, which limits the rule to cases where the spouse was then selected.

In the instant case the evidence fails to show intent to defraud.

Same: MISREPRESENTATIONS OF GRANTOR. Misrepresentation by a grantor, in an ante-nuptial conveyance, of the value of his property is not competent on the question of fraud in its execution, as against the subsequent husband or wife.

Fraudulent conveyances: INTENT: KNOWLEDGE OF GRANTEE: EVIDENCE. Where there is an adequate consideration for a conveyance from a father to his child by a deceased wife the conveyance is not voluntary and will not be set aside as fraudulent at the suit of a second wife, in the absence of knowledge by the grantee of intent to defeat plaintiff's marital rights; and a request of the grantor to withhold the conveyance from record, under circumstances which would cause the grantee no surprise, is not sufficient to charge him with knowledge.

Same: FALSE REPRESENTATIONS: EVIDENCE. The general rule that a voluntary conveyance made in contemplation of marriage will be declared fraudulent does not apply to children by a former wife, where there were no false representations and only reasonable provision was made.

Evidence held insufficient to show false representations.

Estoppel in pais: FAILURE TO ASSERT TITLE. A child to whom a father has conveyed property prior to his second marriage is not estopped to assert his ownership, on the ground that it was in fraud of marital rights, by failing to assert his ownership when called upon subsequently to the marriage to take an acknowledgment of the father conveying other property to another child, where there was no occasion for him to speak.

WEAVER and LADD, JJ., dissenting.

Appeal from Linn District Court.—HON. J. H. PRESTON,
Judge.

THURSDAY, JULY 12, 1906.

Rehearing denied, Thursday, April 11, 1907.

SUIT in equity to set aside a deed to land. The facts sufficiently appear in the opinion. Judgment for the plaintiff. The defendant appeals. *Reversed.*

Dawley, Hubbard & Wheeler and *Lewis Heins*, for appellant.

Chas. W. Kepler & Son, for appellee.

SHERWIN, J.—The plaintiff is the widow of Jesse Beechley, having been his third wife. The defendant is the oldest son of said Jesse Beechley by his first wife. The second wife of Jesse Beechley was a sister of the plaintiff, and died in the latter part of December, 1889. At the time of her death and for many years prior thereto, Jesse Beechley owned about six hundred and sixty-five acres of land, including the land in controversy herein, four hundred and fifty acres. A deed to this four hundred and fifty acres of land was executed and delivered by said Jesse Beechley to the defendant December 17, 1890. About two weeks after the death of his second wife, Mr. Beechley asked the plaintiff to become the third Mrs. Beechley, but she refused to do so, and they did not meet again, nor was there any correspondence between them until in August, 1891, at which time Mr. Beechley again made the plaintiff an offer of marriage, which was accepted, and followed by a marriage on the 8th day of Sep-

1. HUSBAND AND
WIFE: con-
veyances be-
fore marriage:
fraud:
evidence.

tember, 1891. At the time of their marriage, the plaintiff was about sixty-six years old and Mr. Beechley nearly seventy. In the spring of 1890, and again in July, 1891, Mr. Beechley proposed marriage to another widow, and was both times rejected. Not until after the plaintiff and his father had been married, did the defendant have any information or intimation that his father contemplated another marriage. At the time he executed and delivered to the defendant the deed in question, Mr. Beechley still had two hundred and fifteen acres of land left, which was occupied as a homestead by himself and the plaintiff until 1893, when it was deeded by Mr. Beechley to a son by his second wife, the plaintiff's sister, in pursuance of a promise made to her before her death; the plaintiff voluntarily joining in the conveyance thereof. When the land in question was conveyed to the defendant, it was encumbered by a mortgage that he assumed and which, at the time of the trial below, amounted to nearly \$13,000. At the time of this conveyance the grantor also owed other debts amounting to \$3,000 or \$4,000, so that his total liabilities at that time were somewhere from \$15,000 to \$16,000. Before conveying the two hundred and fifteen acres of land, Mr. Beechley had provided a large amount of material for the erection of a new house thereon, and after the conveyance he rebought this material from his grantee, moved it on to the four hundred and fifty-acre tract that he had conveyed to the defendant, and in 1894 built thereon a new house which he and the plaintiff occupied until his death early in 1904, and which the plaintiff still occupies. The defendant's deed was not recorded until after his father's death because of the grantor's request, made at the time of its execution and delivery, that it be not sooner recorded. The record shows that the plaintiff had no knowledge of the deed to the defendant until it was recorded, and it may fairly be said that, at the time of the marriage, the plaintiff supposed that her husband owned the four hundred and fifty acres in controversy as well as the

other two hundred and fifteen acres. The plaintiff bases her right to relief on allegations of fraud in the conveyance to the defendant, and on an estoppel which will be hereinafter more fully noticed.

We are clearly of the opinion that fraud cannot be predicated on the facts disclosed. As we have already shown, there was no engagement nor any negotiations therefor until eight months after the conveyance was made. It is true that the grantor had theretofore proposed marriage to the plaintiff, and some months after her refusal to marry him he had proposed to another and had been rejected; and it may be said perhaps, that he had not entirely abandoned the thought of another marriage if he could find a willing woman; while, on the other hand, three rejections within a year would ordinarily be entirely sufficient to cool the "Douglas' blood" were age, alone, insufficient therefor. Aside from the proposals which we have mentioned and the fact of his subsequent marriage to the plaintiff, there is nothing in the record tending to show that, at the time of this conveyance, the grantor contemplated another marriage, and if he did not, there can be no fraud therein. Even if he then had a fixed purpose to marry as soon as he could find someone who was willing to become his wife, no negotiations or engagement therefor were then pending, and, under the rule of our own cases, the conveyance was not fraudulent as to the plaintiff. In *Gainor v. Gainor*, 26 Iowa, 337, the conveyance sought to be set aside was made seven months before the marriage, and four months before negotiations therefor began. We held it utterly impossible that the conveyance could have been intended as a fraud, and said: "A voluntary settlement or conveyance of property by a wife or husband prior to marriage, will be held fraudulent as to the marital rights of the one to whom she or he may afterward be joined in matrimony, only when made in contemplation of marriage, and pending a treaty of

marriage between the parties. See, also, *Hamilton v. Smith*, 57 Iowa, 15; *Beere v. Beere*, 79 Iowa, 555.

The *Gainor* case undoubtedly states the rule announced in nearly all of the cases treating the subject. Indeed, we have found but one case among a great many which we have examined that holds that an antenuptial voluntary conveyance, if made with intent to defeat the marital rights of any person whom the grantor might subsequently marry, would be void as to such rights whether the person was then selected or not. Such is the rule adopted in *Higgins v. Higgins*, 219 Ill. 146 (76 N. E. 86). After full consideration of the question, we are of opinion that the rule is sound. If the intent to defraud actually exists, it is immaterial whether a particular person has already been selected against whom it will operate. So far then as *Gainor v. Gainor* limits the application of the rule in this class of cases to cases where negotiations or an engagement exist at the time of the conveyance, it must be and is overruled. If the conveyance is made in contemplation of marriage and with intent to deprive the spouse of the marital rights which she would otherwise acquire, it is enough to invalidate the conveyance so far as it affects such rights. But if there be no treaty of marriage at the time of the conveyance, it is, in our judgment, a strong circumstance tending to disprove fraud.

There is evidence tending to show actual misrepresentation by the grantor as to the amount of his property, but it is contended that the evidence is incompetent. We think the contention is correct, but do not deem the question at all controlling on this branch of the case. In some of the earlier cases it was thought that a distinction should be made between silence or failure to disclose the true situation, and actual misrepresentation as to property. The later decisions, however, and the weight of authority in this country, at least, hold that the ignorance of the spouse of a settlement or convey-

2. SAME: mis-
representations
of grantor.

ance pending a treaty of marriage is fatal thereto, though no actual misrepresentation or deceit appear. *Chandler et al. v. Hollingsworth et al.*, 3 Del. Ch. 99, and cases cited. This is an exhaustive and leading case on the subject, and contains a review of the early English and many of the American cases. *Collins v. Collins*, 98 Md. 473 (57 Atl. 597, 103 Am. St. Rep. 408, and note 418.)

The deed to the land in question recites a consideration of \$16,000, and the uncontradicted evidence shows that the defendant assumed the payment of mortgages on the land and other indebtedness of his father amounting in the aggregate to the consideration named in the deed. The evidence shows the land to have been worth from \$16,000 to \$22,000, but in addition to the indebtedness assumed by the defendant the father retained a life interest therein and the possession. It cannot be said, then, that the conveyance was voluntary, and it not being voluntary, it can only be set aside on proof that the defendant was a party to the fraudulent intent of the grantor, if any such intent existed.

There is absolutely no evidence of fraud on the part of the defendant, unless it be said that the request to withhold the deed from record proves fraud. There are two sufficient answers to this suggestion: The grantor gave no reason for his request, and his financial condition at that time was such that it would cause the grantee no surprise. Fraudulent intent will not be presumed, and secrecy alone does not necessarily tend to establish fraud. *Hamilton v. Smith, supra*; *Luckhart v. Luckhart*, 120 Iowa, 248.

The general rule that a voluntary conveyance made in contemplation of marriage will be declared fraudulent, has a well-settled exception in cases of conveyance to children by a former wife, it being generally held that where no false representations are made to the prospective wife, and only reasonable provision is made for such children in proportion to his or her estate, such

3. FRAUDULENT
CONVEYANCES:
intent: knowl-
edge of
grantee:
evidence.

4. SAME:
false rep-
resentations:
evidence.

conveyance is not necessarily fraudulent, but the question in such cases is, was fraud intended? *Hamilton v. Smith, supra*; note in 103 Am. St. Rep. 418. There is no competent evidence that Mr. Beechley made any false representations as to his property before his marriage to the plaintiff, and such representations made thereafter are immaterial. He had two hundred and fifteen acres of land left, worth one-third as much as the land conveyed, at least, and amply sufficient to afford him and the plaintiff reasonable support, and sufficient to afford her reasonable maintenance after his death. Fraud must be clearly proven, and from the record before us we are unable to say that any fraud was intended by the grantor, and we are very clear that no fraud on the part of the defendant is shown. *Hamilton v. Smith, supra*; *Butler v. Butler*, 21 Kan. 521 (30 Am. Rep. 441). It is true as we have already said, that the grantor remained in possession and made certain improvements on the land, but he held a life estate therein which was of value to him, and such possession and improvements do not alone establish adverse possession or a trust for the benefit of the plaintiff. *Luckhart v. Luckhart, supra*; *McClenahan v. Stevenson*, 118 Iowa, 106.

When the two hundred and fifteen acres was conveyed, the defendant, at the request of his father, prepared a deed conveying the same, and later went to his father's home to witness its execution and to take the acknowledgments thereto. The plaintiff claims that, at the time of its execution and as an inducement for her to sign it, it was talked by those present that there would be four hundred and fifty acres left, and that her husband said, "that will be enough for us," and that he further said he would build a new house on it. The plaintiff says she thinks that conversation occurred in the presence of the defendant. She bases her claim to an estoppel on his failure to then disclose his ownership of the four hundred and fifty acres of land. Her testimony as to the statements of her husband at that time

is clearly incompetent under section 4604 of the Code. But aside from that, and aside from her uncertainty as to the defendant's presence when such statements were made, all of the other persons present when the deed was executed and acknowledged, testify that no such conversation was had at that time.

If it were true that the plaintiff were induced to sign the deed by representations, made in the presence and hearing of the defendant, that the four hundred and fifty acres of land still belonged to her husband, we think it would have been his legal duty to inform her that he held the title thereto, for silence when one should speak may create an estoppel as effectually as a declaration. But an estoppel in *pais* is based on fraud, and the conduct relied upon to establish it must be such as to amount to fraud, actual or constructive. There must be deception, and change of conduct in consequence thereof. *Garretson v. Life Ass'n*, 93 Iowa, 402. To create an estoppel in the instant case, it is essential that the defendant should have spoken and disclosed his title, and that the plaintiff was induced to sign the conveyance by his silence. *Garretson v. Life Ass'n, supra*; *Jamison v. Miller*, 64 Iowa, 402. An estoppel by acts and declarations, or by silence, is defined by Bouvier in his Law Dictionary, 541, as follows: "Such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself." See, also, *Wishard v. McNeill*, 85 Iowa, 474. If nothing was said in the defendant's presence about the property remaining after the conveyance of the two hundred and fifteen acres, the defendant certainly was not bound to disclose his ownership of the four hundred and fifty acres simply because he was called upon to take the acknowledgments of the grantors of the two hundred and fifteen acres, for the plaintiff could not have acted on his silence. There can be no estoppel by silence unless there is a duty to speak.

5. ESTOPPEL in *pais*: failure to assert title.

The transaction concerned land in which the defendant was in no way interested, and he was not bound to disclose to the plaintiff a perfectly legal transfer of other lands made two or three years before. 5 Current Law, 1288. The plaintiff is clearly not entitled to have the deed set aside, and to have her statutory interest in the four hundred and fifty acres of land.

Claim is made that the plaintiff put some of her own money into the land in question by way of improvements made thereon by her husband. She sold a little place of her own for \$800 and she testifies that some of the money received from this sale was so used. She is unable to show, however, that any certain sum was used for the purpose, and we, of course, cannot supply the want of testimony on the subject, and cannot therefore find that any substantial amount was so used.

The judgment must be *reversed*.

WEAVER, J. (dissenting). Without questioning the soundness of the legal propositions affirmed in the foregoing opinion, I am constrained to dissent from the conclusion that the charge of fraud is not supported by the evidence. Taking the history of the case from the first conveyance of the four hundred and fifty acres to appellant to the last conveyance to another son of two hundred and fifteen acres, it discloses, in my judgment, a concerted plan to deprive the plaintiff of all interest in her husband's estate, and, after she has served and cared for the husband until his death, turn her out upon the world penniless. I further hold that the plea of estoppel against the defendant has sufficient support in the record.

LADD, J., joins in this dissent.

CECIL M. KIMBRO, Appellee, v. THE NEW YORK LIFE INSURANCE COMPANY, Appellant.

Insurance: REPRESENTATIONS OF AGENT: ESTOPPEL. An insurance
1 company is bound by the representations of its authorized agent who receives and forwards an application and thereafter notifies the insured that the application has been approved and the policy forwarded to him for delivery; and upon the death of the insured, prior to any knowledge to the contrary and before maturity of a note given for the premium, the company is estopped to deny the contract and plead a counter proposition sent the agent to be submitted to the insured.

Payment of premium to agent. Where it is the common practice
2 known to the company for an insurance agent to accept notes for the first premium payable to himself, and to stand responsible to the company therefor, the transaction amounts to payment of the premium as between the insured and insurer.

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

FRIDAY, SEPTEMBER 21, 1906.

Rehearing denied Thursday, April 11, 1907.

ACTION at law upon a policy of life insurance. Judgment for plaintiff, and defendant appeals. *Affirmed.*

J. H. McIntosh and Smith & Smith, for appellant.

Rickel, Crocker & Tourtellot, for appellee.

WEAVER, J.—On December 10, 1903, William F. Kimbro, a resident of Cedar Rapids, Iowa, made application to the defendant for a policy of insurance upon his life in the sum of \$2,000. The application was made through T. A.

Haynes, local agent of the defendant at Cedar Rapids, with whom was associated in this transaction Charles E. Baker, who is styled in the record as defendant's general district agent at the same place. These agents reported their business to the defendant through its branch office located at Des Moines. The policy applied for was of a form or class known as an "Accumulation Policy." On or about the same time Kimbro was examined by the company's physician at Cedar Rapids, who approved him as a desirable risk, and this report with the application was forwarded through the Des Moines branch to the office of the defendant in New York. Moved apparently by something suggested in the application or medical examiner's report, the home office withheld immediate action and wrote to the medical examiner asking him to make closer inquiry as to Kimbro's habits with respect to the use of intoxicants. After some delay the physician reported that at an earlier period in his life the applicant had been somewhat intemperate, but appeared to have abandoned all excess in that direction. The defendant also caused certain inspectors in its service to examine into the applicant's habits and report their findings. Finally on February 2, 1904, the officers in charge of the home office decided not to issue the policy for which application had been made, but executed another form of contract known as an "Adjustable Accumulation Policy," insuring the life of Kimbro for \$2,000, subject to the condition, that, if he died within the period of sixteen years, the limit of the company's liability to his beneficiary should be \$1,228.44 with a return of the premiums paid on the policy. This policy executed and signed in due form was forwarded by mail to the agent Haynes, calling his attention to the change and directing him to submit it to Kimbro with proper explanations for his acceptance, if found satisfactory. On receipt of the policy Haynes wrote to Kimbro as follows: "Cedar Rapids, Iowa, February 5, 1904. Mr. William Kimbro, City — Dear Sir: I am pleased to advise you that your

policy arrived this morning. I will call, however, this pay day and deliver it to you. Kindly arrange to have the amount of your first note ready, \$13.03, and oblige. Yours truly, T. A. Haynes. P. S. I was afraid for a little while, owing to a great deal of inspection being made, that you might be rejected, but am pleased to say the policy is here."

It should be said in this connection that at the time of making his application Kimbro made and delivered to the agent his promissory notes for the first half year's premium, which by the terms of the policy was payable in quarterly installments. The first note was made payable February 18, 1904, which was the day on which Kimbro expected to draw or receive his wages for the previous month. On Monday, February 8, 1904, Kimbro again left home on his trip without seeing or having any other communication with Haynes, and on the evening of the same or following day returned sick. Soon thereafter he was taken to the hospital, where he died on February 25, 1904. The malady from which he died was diagnosed as typhoid fever. On February 22, 1904, the defendant's branch office in Des Moines, learning of the situation with respect to the risk, telegraphed Haynes to return the policy and later sent notice of Kimbro's death to the home office in New York, which replied giving directions to have Haynes mark the premium notes as canceled and return them to Kimbro's administrator. In obedience to this direction, and following the form of communication prepared and sent to him from the company's office, Haynes wrote to the widow of Kimbro, as follows: "Cedar Rapids, Iowa, March 5th, 1904. Mrs. Cecil M. Kimbro, As Administratrix of the Estate of William F. Kimbro, Deceased, No. 422 6th Avenue E. Cedar Rapids, Iowa — Dear Madam: Under date of December 16th, 1903, William F. Kimbro late of Cedar Rapids, Iowa, signed an application for insurance in the New York Life Insurance Company, and thereafter gave me, as the agent

who took said application, the inclosed notes on account of the first premium. The company declined the application, and so I return herewith the notes for cancellation. Yours truly, [Signed] T. A. Haynes." Prior to this, however, and before the death of Kimbro, his wife, the beneficiary in the policy, went to Haynes and tendered the amount of the premium and demanded a delivery of the policy, which circumstance the agent reported to the company through its cashier for Iowa by letter, as follows:

Agency at Cedar Rapids, Iowa, Feb. 24th, 1904. Mr. A. A. DeCelle, Des Moines, Iowa.— Dear Sir: Re No. 2,184,-615 — W. F. Kimbro. This party is still in the hospital here, sick of typhoid, and last report is to the effect that he is getting along very nicely, but there are so many different complications liable to set in that one never can tell which way the tide will turn. Mr. Kimbro's wife was in yesterday and tendered me the money for his notes, but I told her that the cashier at Des Moines had requested me to return the policy to him, and that you had written to the company, and would advise me soon whether I could deliver the policy to her husband or not. She said she could not understand why I could not deliver the policy to her, as her husband had told her to pay the money to me and get the policy. I endeavored to make clear to her what kind of a policy the company had issued on her husband's life, and told her that, as soon as I heard again from you, I would call and see her. I sincerely trust that Mr. Kimbro will get well, and that no complications will arise in connection with this policy, as it would certainly cause trouble if the insured should die and the company should not pay the claim, inasmuch as notes were given in full settlement of the first year's premium. The insuring public thoroughly understands that a New York Life policy is incontestable from date of issue, and I advised him when the policy arrived. Yours truly, T. A. Haynes.

There is some question raised in argument as to the fact and sufficiency of this tender; but if a tender was essential to plaintiff's right of recovery, which we do not decide, the evidence is clearly sufficient to sustain the judgment of

the trial court in this respect. The company denying that an insurance had ever been effected upon Kimbro's life, and refusing to adjust or pay the loss occasioned by his death, this action at law was instituted on May 19, 1904. By the first count of her petition plaintiff declares upon a contract or agreement of insurance upon the life of Cecil M. Kimbro for the sum of \$2,000, on the terms and plan usually embodied in the company's so-called accumulation policy. By another count of the petition the issuance of an adjustable accumulation policy is alleged, and that the delivery and acceptance thereof by Kimbro. was prevented by the fraud of the company's agents and asks to recover upon said policy as if it had been in fact delivered. By a third count, the plaintiff seeks to recover damages on account of the alleged fraud of the defendant's agents in depriving her of the insurance which otherwise would have been hers. As the last two grounds of recovery seem not to have been recognized or sustained by the trial court, and plaintiff has not appealed, we shall not again refer to them. The defendant answers in denial. It also avers that the notes given by Kimbro for the premium upon the policy applied for by him were the property of the agent Haynes, and not of the company. It further alleges that the application made by Kimbro was disapproved, and no policy ever issued thereon, but another and different policy was prepared and sent to Haynes with authority to deliver it only on condition that said applicant sign and deliver to said agent a written request for such substitution in the following form:

New York Life Insurance Company, 346 Broadway, New York City. I hereby request, as an amendment to my application, dated the 16th day of December, 1903, that the insurance under any policy issued thereon shall take effect as of the 2d day of February, 1904, instead of on the date of said application, as provided herein, and I agree that the insurance year, the accumulation period and the loan and nonforfeiture provisions of said policy shall all relate back

to the date on which the insurance takes effect. Witness ——. Forwarded from Iowa Branch Office, —, 190—, —, Cashier.

Exhibit H. Name — Kimbro —. No. 2,184,615. Division of Policy Issues: New York Life Insurance Company, 346 & 348 Broadway, New York. The New York Life Insurance Company will please accept the following answers in lieu of the answers to the corresponding questions in my application for insurance dated the 16th day of December, 1903. Question No. —. I desire a policy on the ordinary life adjustable accumulation policy plan, as set forth in the policy form of the company (with terminating options only), and I select the 20 year accumulation period. Question No. —. a No. — b (Should) remains unanswered. And I hereby agree that the above answers shall form a part of my said application for insurance, and I hereby renew and confirm my agreement therein. Dated —, 190—. Witness: —, Applicant.

This instruction, it is alleged, was never carried out by the agent, nor did Kimbro ever consent to receive or accept said substituted policy, and no contract of insurance was ever consummated or agreed upon. It is further alleged that Haynes had no authority to accept the notes of the applicant for the premium upon the policy. Replying to this answer the plaintiff alleges that the company is estopped by the acts of its officers and agents, as hereinbefore related, to deny the existence of said contract of insurance or its liability thereon. By agreement of parties the cause was tried to the court without a jury, and, judgment being entered for the plaintiff, the defendant appeals.

It is true, as argued by the appellant, that an application for insurance is not a contract, but rather an offer or tender of terms to be submitted for the consideration of the company to which it is addressed. It is equally true that, upon a rejection of such offer and the submission of a counter proposition by the company, the latter does not become a contract until accepted by the applicant; but this concession is by

1. INSURANCE:
representations
of agent:
estoppel.

no means decisive of the sufficiency of the defense in the case at bar. If plaintiff's right of recovery was based on the "so-called adjustable accumulating policy" sent by the appellant to Haynes to be tendered to Kimbro, it would come fairly within the rule approved in *Stevens v. Insurance Co.*, 87 Iowa, 283, and *Mutual Ins. Co. v. Young*, 23 Wall. 85 (23 L. Ed. 152), and the judgment below would have to be reversed. Such in fact was the effect of the action of the district court upon the second and third counts of the petition, and, as already suggested, there being no appeal by the plaintiff, we have left to consider whether there is sufficient showing of a contract of insurance upon the basis of Kimbro's application, or, what is the same thing, whether the appellant is estopped to deny the making of such contract. Considered from this point of view, we find ourselves in harmony with the conclusion reached by the trial court. It is true, as already said, that a mere application for insurance cannot be given the effect of a contract; but it is a proposal or offer to take insurance, and, if there is any evidence on which the trial court could find as a fact or as conclusion of law that such offer was accepted, then we must treat the applicant as insured upon the terms and conditions of the application. The issuance and manual delivery of a written policy is not ordinarily essential to a contract of insurance. *Preferred Acc. Ins. Co. v. Stone*, 61 Kan. 48 (58 Pac. 986); *Int. Trust Co. v. Ins. Co.*, 71 Fed. 81 (17 C. C. A. 608); *Tayloe v. Ins. Co.*, 9 How. 390 (13 L. Ed. 187); *Schultz v. Ins. Co. (C. C.)*, 77 Fed. 375; *Sheldon v. Ins. Co.*, 25 Conn. 207 (65 Am. Dec. 565).

The appellant dealt with the applicant through Payne or Baker, its agent at Cedar Rapids. That agent was its representative, not only to receive and forward the application, but was also its representative expressly authorized to complete the negotiations and deliver the policy which the appellant prepared and returned for the applicant's acceptance. He was the only medium through whom the business

between the contracting parties was carried on. Within the scope of that employment, his hand was the appellant's hand, his voice was its voice, and his promises and assurances were the promises and assurances of his principal, notwithstanding any undisclosed instructions or limitations existing in his contract of employment. He was authorized and empowered to communicate to Kimbro the company's action upon his application, and under the elementary rule just referred to his representations and statements within the line of that duty were binding upon his principal. Now, what was the information conveyed by this agent to the applicant. He says: "I am pleased to advise you that your policy arrived this morning. . . . I was afraid for a little time, owing to a great deal of inspection being made, that it might be that you would be rejected, but am pleased to say that the policy is here." It is idle to argue that by this language the agent did not intend to assure Kimbro that his application had been accepted, but was referring to a substituted policy, which required a modification or change in his application. When he told the applicant that his policy had arrived, it was the unmistakable equivalent of a statement that the policy applied for had been issued to him, and when he emphasized that statement by further saying that he had feared for a time that the application might be rejected, but was pleased to be able to say the policy was now at hand, it was the strongest possible assurance that such application had not been rejected, but had been approved and policy issued accordingly. Moreover, instead of any suggestion that in order to complete the contract it was necessary for Kimbro to amend his application or take any other or further action, the agent simply informed him that, after the approaching pay day, he would himself call around, turn over the policy, and requested Kimbro to be prepared to take up his first note given for the premium. This was an assurance on which the appli-

cant had a right to rely and rendered it unnecessary for him to call upon or make further inquiry of the agent.

Under such circumstances we think he had the right to rest upon the conclusion that he was insured according to the terms of his application, and that the company cannot be heard to say that no contract of insurance had ever been effected. It is a well-settled rule of law that a principal will not be heard to deny the truth of the representations of his agent with respect to the matter which is the subject of such agency, and the fact that the agency is of a limited or special character does not prevent the application of this rule. Speaking of the representations of the soliciting agent under circumstances quite similar in some respects to those in the case at bar, the Kansas court, in *Accident Society v. Stone, supra*, says: "It is argued that these statements were by an agent whose powers were limited and special, and that the company was not bound by them. The case in this particular is not within the rule of the decisions cited by counsel. The local agent did not assume to waive anything in disregard of, or even within, the limitations of his authority. . . . As before stated, it was the custom of the company to deliver policies to accepted applicants through its local agents, and through them to return premiums paid upon applications which it rejected. This qualified the agent to impart information in respect to those things which were to be done by him. The giving of information in respect to a thing which, when to be done, the company would intrust to him to do, came within the scope of his authority." The appellant intrusted to Haynes the closing of the contract with Kimbro, and his contract and representations in respect thereto cannot be repudiated by it after a loss has occurred. In *International Trust Co. v. Insurance Co., supra*, the Circuit Court of Appeals held the company bound by the representation of a bookkeeper in the office of the company's agent that a renewal of an outstanding policy had been granted. See, also,

Walsh v. Insurance Co., 30 Iowa, 133. Counsel argue that, in order to estop the company from repudiating the act of its agent, it must be alleged and shown that the applicant would have procured other insurance had the agent told him the truth. But, as suggested by the Kansas court, *supra*, the rule here appealed to is not applicable to the facts before us. While the obligation of a principal because of the act of an agent may under some circumstances and in a limited sense be said to rest upon the doctrine of estoppel, it is not true that the strict rules governing estoppels in general are in all cases controlling upon the effect to be given to an agent's act. If, for instance, an agent be intrusted with authority to speak for his principal in concluding a contract between that principal and a third person, what such agent says or does within the apparent scope of his authority binds his principal, not simply because the person relying thereon loses an opportunity to make an equally advantageous contract elsewhere, but because for the purposes of that transaction the act of the agent is the act of the principal, and an agreement thus concluded upon sufficient consideration is enforceable as a valid contract. But, even if we were to consider this case as being governed by the law of estoppel, we find no reason to disturb the judgment of the trial court. The question whether Kimbro would in fact have procured other insurance had he been notified of a rejection of his application is not an essential consideration. It would be sufficient to estop the company if he relied upon the representation of the agent and in such reliance died, or by reason of intervening sickness became incapable of securing other insurance. That Kimbro had the right to rely upon the agent's assurance no one can well question, and that he did rely upon it the facts sufficiently demonstrate. The statement by the agent was, in substance, that the policy applied for (which was to date from the date of the application) had been issued, and that he himself would bring it to Kimbro after "pay day," which

was February 18, 1904, and collect the amount of the first premium note. This, as we have before noted, left nothing for Kimbro to do save to wait the arrival of pay day and then receive the written evidence of the insurance, which he was informed had been effected. He did wait, and while waiting was attacked by a sickness which resulted fatally. There is no provision in the application or in the policy applied for which makes the insurance conditional upon the actual receipt of the written policy by the applicant while in good health; nor is there any other condition which avoids the operation of the ordinary rule that a proposal or offer by one party, followed by a duly communicated acceptance by the other party, constitutes a contract, even though the contemplated written evidence thereof has never been executed. To relieve the company from liability under such circumstances would not serve to promote fair dealing or exercise of good faith in the business of life insurance.

It is next urged upon our attention that in any event the advance premium which was payable in quarterly installments had not been paid, and therefore under the terms of the policy applied for the insurance never became effective. No general rule adopted by an insurance company as to the prepayment of premiums can take away its power to waive or ignore such requirement and to bind itself by a contract without such payment. Nor does such provision in any manner restrict its right to accept a promissory note as such payment. The testimony on part of appellant that its agents were not authorized to accept notes for premiums, and that the notes in the present case were a matter between the agent and the applicant only, must, in view of other undisputed facts, be taken with some grain of allowance. It appears without controversy that the agent taking them inclosed the notes with the application and returned them to the superior officer or agent to whom he was immediately responsible. With the application and the notes taken in

8. PAYMENT OF
PREMIUM TO
AGENT.

violation of its ostensible rule all before it, the appellant made no objection to this assumption of authority by its agent, but proceeded to consider and pass upon the merits of the application. So far as the record shows, the company continued to hold these notes until it discovered that a loss was impending, when by its general solicitor it wrote to its cashier in Des Moines, saying: "Kindly have the agent indorse the note as follows: 'The New York Life Insurance Company declined the application for insurance on account of which this note was given, and therefore I now here return the note for cancellation. T. A. Haynes.' After the agent has written the above on the back of the note and signed his name to it, then have him forward the note by registered mail to the administrator of Kimbro's estate, with the following letter: 'Mr. ———, Administrator of the Estate of William F. Kimbro, Deceased, Cedar Rapids, Iowa.—Dear Sir: Under date of December 16, 1903, William F. Kimbro, late of Cedar Rapids, Iowa, signed an application for insurance in the New York Life Insurance Company, and thereafter gave me, as the agent who took said application, the inclosed note on account of the first premium. The company declined the application, and so I return herewith the note for cancellation.' Your careful and prompt attention to this will greatly oblige. Yours truly, General Solicitor." This assumption of authority over the notes and the reason assigned for ordering them returned to the administrator are wholly inconsistent with the claim now made that they were taken without its cognizance or consent.

The evidence also tends to show that the first year's premium or a large part thereof was due to the agent himself under the terms of his employment, and, so long as he properly charged the same to himself in his agency account, the taking of notes therefor was treated by the company with indifference. When freed from all obscurity, the testimony on the part of the appellants on this branch of the

case means nothing more than that agents were forbidden to take notes payable to the company for the first year's premium upon policies issued or applied for; but it was a common practice known to and approved by the company for agents to take such notes payable to themselves, and charge themselves therewith in their agency accounts, the company holding the agents responsible as for a cash collection. Such a transaction is a payment of the premium as between the assured and the company. The giving of the note instead of cash in advance by the applicant will not invalidate the insurance, if the contract be otherwise complete. See, directly in point, the very recent case of *Kilborn v. Insurance Co.*, 99 Minn. 176 (108 N. W. 861). In view of all the circumstances to which we have referred, it cannot be said that the judgment of the district court is without support in the record, and its finding in this respect must be treated as having the force and effect of the verdict of a jury. As bearing also upon the effect of failure to exact advance payment of premiums, see, also, *Elkins v. Insurance Co.*, 113 Pa. 386 (6 Atl. 224); *Sheldon v. Insurance Co.*, 25 Conn. 207 (65 Am. Dec. 565); *Walsh v. Insurance Co.*, 30 Iowa, 133; *Norton v. Insurance Co.*, 96 U. S. 234 (24 L. Ed. 689).

Error is also assigned by appellant upon the rulings of the trial court in excluding certain offered testimony. The points thus made are ruled by the conclusions we have hereinbefore announced, and we regard it unnecessary to discuss them in detail.

We find no reversible error in the record, and the judgment of the district court is *affirmed*.

F. D. WINGERT ET AL., Appellants, v. SNOUFFER & FORD
ET AL., Appellees.

134	97
138	84

F. D. WINGERT, ET AL., Appellants, v. CITY OF TIPTON,
Appellant; SNOUFFER & FORD ET AL., Appellees.

134	97
139	467
142	735
dl42	744

134	97
144	417

Municipal corporations: TEMPORARY INJUNCTION: NOTICE. A temporary injunction restraining a city from levying a special assessment and issuing certificates therefor, is not an interference with the ordinary business of the corporation within the meaning of Code, section 4359, requiring notice when such is the effect of the order sought.

Inadequacy of bond. Inadequacy of the bond is not ground for dissolving a temporary injunction, unless there is a failure to comply with an order for additional security.

Dissolution of injunction. The merits of a controversy will not be determined on a motion to dissolve an injunction.

Street improvements: FAILURE TO COMPLY WITH CONTRACT: EVIDENCE: INJUNCTION. One who contracts to perform the work of paving in accordance with certain specifications cannot, in default of compliance, recover on the contract; and abutting owners whose property is to be assessed on account thereof may enjoin the issuance of assessment certificates therefor.

Evidence held to show failure to comply with specifications.

Same: OBJECTION TO ASSESSMENT: ESTOPPEL. The question of compliance with a contract for street improvement is for the city council, and individual taxpayers are not estopped to object to an assessment of their property to pay the expense thereof, by reason of the fact that they failed to make objection to the character of the work as it progressed.

Same: An equitable estoppel bottomed upon silence does not arise unless there is a duty to speak and by failure to speak the other party, ignorant of the truth, is misled into doing something he would not have done but for such silence.

Parliamentary law: MOTION TO RECONSIDER. A motion to reconsider if carried leaves the original question precisely as it stood before the vote was taken, and in the absence of a special rule a motion to reconsider is carried by a majority vote notwithstanding the presiding officer may declare otherwise.

VOL. 134 1A.—7

Appeal from Cedar District Court.—HONS. B. H. MILLER
and W. G. THOMPSON, Judges.

TUESDAY, SEPTEMBER 25, 1906.

Rehearing denied Thursday, April 11, 1907.

ACTION in equity growing out of the work of improving certain streets in the city of Tipton, this State. The plaintiffs are owners of property abutting on such streets, and the demand of the petition is that an assessment levied by the city on their property to pay the cost of such work of improvement be declared invalid and set aside; further, that the city be restrained from issuing assessment certificates based on such assessment. A temporary writ was ordered and issued upon the filing of the petition. Before the trial of the main case on its merits, the temporary writ thus issued was dissolved on motion of defendants Snouffer & Ford—Judge Miller presiding. From the order thus made the plaintiffs appealed, and such is the matter involved in the appeal first above entitled. The main case coming on for hearing and trial—Judge Thompson presiding—there was a decree as against plaintiffs and the defendant city, in favor of defendants Snouffer & Ford, and therefrom the plaintiffs and the defendant city appeal. And such is the matter involved in the appeal second above entitled.—*Reversed.*

I. J. Hamiel, France & Rowell, C. J. Lynch, W. N. Treichler, C. O. Boling, and F. J. Casterline, for appellants.

Redmond & Stewart and Wright, Leach & Wright, for appellees.

BISHOP, J.—In December, 1902, a contract was entered into between the city of Tipton and Snouffer & Ford,

of the city of Cedar Rapids, by the terms of which the latter were to prepare for curbing and paving, and to curb and pave, certain streets in said city. The contract provides among other things that Snouffer & Ford, who are designated as the contractors, shall furnish all materials, labor, etc., to execute and complete the work in the best possible manner, and according to plans and specifications. That they shall employ only competent foremen, experienced mechanics, and laborers, etc. A further provision declares that the work shall be done under the supervision of a committee of the city council, consisting of three members, designated as a "Committee on Public Works," and this committee is authorized to appoint an inspector, whose duty it shall be to point out to the contractors any neglect or disregard of the specifications. It is said, however, that the right of final acceptance shall not be affected by such inspection. Further —

All materials furnished and work done will be inspected by the engineer (employed by the city), and if not in accordance with these specifications and the contract, they will be rejected, and shall be immediately removed and other work done and materials furnished in accordance therewith. . . . The contractor shall furnish all necessary facilities, should it be advisable to make any examination of the work already completed. If any be found defective in any respect, they shall defray the expense of such examination, and of satisfactory reconstruction. . . . The engineer shall have the right to reject, at any time previous to the final settlement with the contractors, any work or materials which may be found to be faulty. . . . No deviation from the plans and specifications will be allowed except by written authority of the engineer.

With respect to the materials to be used, and the manner of doing the work, the following provisions appear in the contract:

The subgrade of the roadway shall be of the depth of the paving, including foundation, after having been thor-

oughly compacted and secured from further settlement by flooding, ramming or rolling, etc. When graded and shaped in proper form, the street shall be thoroughly rolled with a steam roller until the subfoundation is compacted to the satisfaction of the committee. Any depression thereafter discovered shall be filled and the surface rerolled. On the subgrade shall be laid a foundation of cement concrete to a uniform thickness of four inches. In making the concrete an approved brand of Portland cement shall be used. The sand shall be clean, sharp river sand. The crushed stone shall be of the best quality of limestone. The cement, sand, and stone shall be thoroughly mixed in proportions as follows: One part cement, three parts sand, and seven parts stone. The concrete shall be deposited in a layer on the roadway in such quantity that after being rammed in place it shall be of the required thickness, true, and smooth, and five inches below and parallel with the top of the finished pavement. Upon the concrete foundation shall be placed a layer of clean sharp sand, free from loam and all foreign matter to a depth of two inches. Upon such sand layer, brick shall be laid, and the surface of the pavement shall then be thoroughly compacted by ramming or rolling so as to leave the street to the required crown and grade.

It is provided that upon the completion of the improvement a final estimate of the work done and materials furnished will be made immediately after the city engineer has satisfied himself by tests, examinations, or otherwise, that the work has been and is finally and fully completed in perfect accordance with the contract and specifications. Payments will be made on the completion of the contract and the acceptance of the work by the city council in assessment certificates based on assessments against abutting property to the extent that such assessments may be lawfully made; the balance to be paid in warrants drawn on the improvement fund of the city.

In their petition the plaintiffs set forth the contract in question, and they allege that the contractors claim to have completed the work contemplated thereby. It is then alleged that the materials used and the work done were not

in compliance with the contract, and that the pavement is inferior and worthless. Specifically, they charge that the subgrade was not prepared in accordance with the specifications; that an inferior quality of cement, sand, and stone was used for the concrete work; that as to the foundation there was a failure to use the required quality and quantity of materials prescribed, and a failure to properly mix and prepare such materials as were used; that the sand used for a layer or cushion was inferior in quality and deficient in quantity; that there was a failure to construct the paving to conform to the grade of the street, thereby leaving the surface uneven and irregular. It is then said that at a meeting of the city council, the committee on public works by two of its members, acting either negligently or in collusion with the contractors, reported the work contemplated by the contract as completed, and as satisfactory in every way and in accordance with the terms of the contract; that at such meeting the city engineer also reported the work as complete and in accordance with the plans and specifications, and submitted a plat and assessment list embracing the names of the abutting property owners, including plaintiffs, liable to assessment, and the amount to be assessed to each. Further, that upon the coming in of such reports the council passed a resolution approving the report of the committee, and accepting the improvement as satisfactory, and by a further resolution directed notice to be given of the time when objections would be heard and assessments levied. And it is said that such notice was given, and an assessment levied in accordance with the report of the engineer, and that, unless restrained, assessment certificates will be issued.

The defendants Snouffer & Ford answered the petition, denying all the allegations of fraud and failure on their part. In a cross-petition against the defendant city and its officers, they allege the completion of the work according to contract, and the approval and acceptance thereof by the city, and pray for an order requiring payment to be made in

manner and form as provided in the contract. The defendant city answered plaintiffs' petition, admitting the truth of the allegations of fraud and failure as charged against defendants Snouffer & Ford; denying that any assessment had been levied; and asserting that it was opposed to accepting the work in question as satisfactorily completed, and opposed to the levy of any assessment on account of said work. The city also answered the cross-petition of defendants Snouffer & Ford, denying that the work in question was ever approved and accepted by it; denying that the work was done and completed by said defendants in accordance with the terms of their contract; asserting that, on the contrary, the work was inferior both in material and workmanship; denying that any sum had become due to said defendants. It was in this situation that the motion of defendants Snouffer & Ford to dissolve the temporary injunction was presented to the court, and the ruling entered sustaining such motion. Thereafter further pleadings were filed by the respective parties, the averments of which will be sufficiently set forth as we proceed.

I. The motion to dissolve the temporary writ was put upon these grounds: (1) The writ was ordered and issued without notice to the defendants; (2) the bond required was inadequate in amount; (3) the allegations of the answer of the moving defendants are sustained, and the allegations of the petition are shown to be untrue, by the affidavits attached. Other grounds are embodied in the motion, but it is not contended that they were well taken. With the motion there was submitted to the court by defendants the affidavits of numerous persons tending to sustain their claim that the work of improvement in question was fairly in compliance with the contract. Also an affidavit showing that pursuant to the notice published by order of the council, several of the plaintiffs appeared and filed objections; some of them to the report of the engineer as to frontage; some of them as to the amount of the proposed assessment; and

some of them on account of the defective and inferior character of the work. The plaintiffs also submitted numerous affidavits tending to sustain their claim that the work failed of compliance with the contract. The motion should have been overruled. In view of the result reached by us on the main case, it is not necessary that we go extensively into the reasons upon which our conclusion is based. An injunc-

1. MUNICIPAL CORPORATIONS: temporary injunction: notice.

tional order at the suit of an abutting owner to restrain a municipal corporation from levying an improvement assessment, and the issuance of certificates based on such assessment, cannot be considered as having the effect to stop the ordinary business of the corporation within the meaning of Code, section 4359 as contended, for by the ordinary business of a municipal corporation is meant simply the matters coming within the exercise of those powers and functions conferred upon it by law which are beneficially incident to its existence and operation as a corporation. It does not extend to those matters where the city acts merely by appointment from the State, and in respect of which the beneficial interest is in the public at large.

As to the bond there was no evidence that it was inadequate. Had there been, the injunction should not have been dissolved except upon the failure or refusal of the plaintiffs to comply with an order for additional security.

2. INADEQUACY OF BOND.

Coming to the third ground, it was clearly improper to proceed, intermediately upon a motion to dissolve, to an investigation of the merits of the case through the medium of affidavits. In the petition, plaintiffs

3. DISSOLUTION OF INJUNCTION.

charged a failure on the part of Snouffer & Ford to perform their contract; that, notwithstanding this, payment by the city through the issuance of assessment certificates was about to be made. The denial of the answer went no further than to put in issue the charge of failure to perform. Such being the situation, the motion

to dissolve presented the same questions of equity as arose upon the answer, and hence amounted to nothing more than an attempt to obtain by summary action a decision as to the equity of the case.

II. Coming to the main case, it will be observed that both plaintiffs and the city make common cause against the defendant contractors on account of the character of the

4. STREET IMPROVEMENTS:
failure to
comply with
contract:
evidence:
injunction.

work done under the contract. And we may begin by saying that a full and careful reading of the record makes it clear that in many of the respects charged, and in substantial degree, the work of improvement failed of compliance with the contract. Indeed the court below did not find otherwise. It expressly appears in the record that the conclusion for a decree as entered was bottomed wholly upon other matters arising out of the issues as they presented themselves on final submission. To such matters our attention will be directed presently. We shall not attempt a detailed discussion of the evidence bearing upon the character of the work. Some twenty witnesses, residents of the city — and some of whom were workmen employed by the contractors — testified on the subject for plaintiffs, and almost with one voice they declare that the subgrade was very uneven — in some places three or four inches deeper than in others; that after the subgrade was prepared and rolled, hauling was done over it with wagons and in places cut up from two to six inches deep; that a considerable portion of the concrete foundation was put down in mud and water, in places ankle deep; that in some instances mud would show through the concrete; that in places the concrete was put in with but little and sometimes with no mixing; that the surface of the concrete was left rough and uneven; that after the concrete had been down for days, and, according to some of the witnesses, after two or three weeks, it was soft and “crumbly” in many places, so that holes could easily be dug therein with the hand or foot, and the broken stone loosened. One wit-

ness says that after the concrete had been down nearly two weeks a wagon loaded with sand was hauled over it, and the wheels cut through the concrete for a distance in length of nearly a block. Another witness, a contractor and builder, engaged at the time in building in Tipton, testified that during the course of the paving work he purchased of the defendant contractors ten barrels of their cement; that about half of it was of excellent quality, and the other half was no good — sand would not make it stand or set it. Without dispute, the sand used for a cushion was bank sand, and many of the witnesses describe it as a mixture of clear sand, clay, and soil. Several give the proportion of the soil as from one-fourth to one-third. A number of witnesses testify that the sand cushion as put in varied in depth from one-fourth of an inch to three or more inches, and one, a workman on the job, says that in several instances where, in leveling off the cushion, it was found that the concrete was higher than the grade of the cushion, enough sand was thrown over it with shovels to cover up the concrete, and the brick then put in place. The attention of several witnesses was called to the character of the surface of the pavement, and they described it as uneven, with frequent depressions, wavy, etc. And some of them testify that as time goes on the unevenness becomes more apparent.

As directly opposed to this mass of evidence, there is the testimony of three witnesses only introduced by the defendant contractors: Geo. Patterson, their foreman, who was present and in charge of the concrete work; Robert Roberdee, one of the city committee on public works, and who acted as inspector by appointment of that committee; and J. D. Wardell, the engineer employed by the city. Patterson says that the materials used and the workmanship was in full compliance with the contract and specifications. On cross-examination, he admits that it was his first experience in putting in a concrete foundation for paving. Roberdee testifies that the work was put in and completed

in substantial compliance with the contract. Wardell, whose home was at Cedar Rapids, says that he had nothing to do with the inspection of the work in question as it progressed, but went up to Tipton on occasion as required to advise with the city officials in charge. Respecting his knowledge of the work, as of the time it was being done, he was asked on direct examination only as to the character of the sand used for cushion, and thereto he answered that at one time when present he found some of the sand unsatisfactory and recommended that it be taken out, "but the majority of the sand was satisfactory under the specifications." On cross-examination he says that on one occasion Roberdee told him of the method employed in measuring the cement, sand, etc. And, in effect, it is his testimony that he concluded that the proportion of cement used was short; that he advised a requirement for the use of a greater proportion. He also refers to another occasion when objection was made to the effect that the required amount of cement was not being used in places. And he says that as to one place which he examined he found that the specifications were not being complied with, and that he so informed the committee. Whether or not this information was followed by any change in the work does not appear. Between the time when the work was done and the time of the trial, several examinations of the pavement were made by civil and municipal engineers. These were procured to be made in part by the plaintiffs and the city, and in part by the defendant contractors, and the engineers were witnesses on the trial. One of these, a witness for the city, made an examination October 23, 1903, eleven days after the work was completed, and he says that the surface of the pavement was "irregular, pitted, uneven, and with depressions." He further says that, in his examination, he made sixteen openings in the pavement distributed over the entire area; that, as to the sand cushion, the sand was not sharp and clean — it contained some clay and foreign matter, and was not a

fair sand for that purpose; that the cushion varied in depth from one to four inches. As to the concrete, he says that in six of the openings the appearance was satisfactory, and he did not break through it. In the remaining places the concrete varied in thickness from two to four and one-half inches; that in quality it was poor, and he could not get a large piece intact. He further says that "concrete made as required by the specifications in question would have been satisfactory; that the surface would have been smooth, and the concrete hard so as to resist a pick."

In December of the same year, another engineer examined the work at the instance of the city. He says that the majority of the surface of the pavement was irregular; that at numerous places there were pits or depressions from one-half to three-fourths of an inch in depth, and, in some instances, from four to five feet in diameter. He made five openings into the pavement, each about two feet square, and he says that the sand cushion varied in depth from one to four and one-half inches; that he subjected a sample to a test, and found that it contained about 50 per cent. of clay and organic matter. Such a cushion, he says, "would cause unevenness and depressions in the pavement; it would settle after the roller or under traffic." As to the concrete, he says it varied in depth from two to four and one-half inches; that he failed to find a piece that would hold together; that in places the mud and dirt had worked up through; that in some cases there seemed to be almost an entire lack of cement, and in other cases the formation was nearly all cement. The witness says he made another examination in April following, when eleven openings were made in the pavement. From these it was disclosed that the sand cushion varied in depth from one inch to two inches; that the sand was finer and dirtier than ordinary bank sand; that there was clay all through it. As to the concrete, he says it varied in thickness from two and seven-tenths inches to four inches. These are excerpts from the further testimony

of the witness: "Concrete begins to set in from one to one and one-half hours. After several days it is safe to drive on it. We found in both examinations only two solid bits of concrete in which the cement was hard enough so that they could not break it out; instead of the rock breaking, it would part from the cement, showing an unevenness in mixing and spreading either a poor quality of cement or else a lack of cement. If mud becomes mixed with the concrete it will destroy its strength. I found evidence of mud having oozed up through the concrete, and it affected it so that you could break the concrete all in pieces with your fingers. I found some places where the concrete was of such poor consistency it looked like sand, and when I picked it up it fell to pieces. In some places there was too much cement and not enough sand; in others too much sand; and in others too much stone. It was not a uniform mixture. In my opinion two blocks [of the paving] in their present condition are no better than if made of common macadam and no cement at all."

Still another engineer made an examination of the pavement at the instance of the city, during the progress of the trial. As a witness, he says that the surface of the pavement was generally uneven; there are depressions where water would lie in pools from one-fourth to three-quarters of an inch deep. Further, he says that he made thirteen openings in the pavement, and found that the sand cushion varied in depth from one-half inch to two and one-half inches; that it was a mixture of pure sand, loam, and other foreign matter. As to the concrete, he says it varied in thickness from two and one-half inches to four inches. In most places he found it soft—"what you would ordinarily call dead mortar"—whereas, if put in according to the specifications, it should have been of that degree of hardness to resist a pick. "It would cause a pick to ring and have a live sound as rocks would have." He says that in several places he found that mud and black soil had worked up through the con-

crete, and in all such places the concrete was soft and brittle. "I would say that the two blocks adjoining the courthouse square are no better than ordinary macadam having no cement at all; the block east is a trifle better, although very poor."

A building foreman in the employ of the general government at Rock Island arsenal, who had had extensive experience in the use of concrete, was a witness for the city. He says that he had examined the pavement in question and that the concrete is not good; it is rotten and dead; that in every place he examined except one the concrete can be crumbled by the hand. "Concrete made in proportions of one, three, and seven makes a solid mixture if properly handled." One of the engineers testified that to cover the area called for by the contract it would require one thousand, one hundred and sixty-nine barrels of cement. This was followed by evidence strongly tending to show that the number of barrels actually used was only about eight hundred and thirty. It may be remarked in passing that no attempt was made by the contractors to show the number of barrels actually used by them.

The examination made at the instance of the contractors took place just previous to the trial. It was participated in by five engineers — one of whom was Wardell — and thirteen openings were made in the pavement at various places. Wardell was called first as a witness. He says that in ten of the openings the depth of the sand cushion varied from one inch to one and three-quarter inches, while in two the depth was two inches or over; that the quality was up to specifications. He says that in seven of the openings the concrete was of the depth required by the specifications, and appeared to be good; in five of the openings it was short of the required depth. On cross-examination he admits that the samples of concrete taken out from the five openings "was not as good as it ought to be; it was not what the specifications called for — full set concrete." Being shown

a sample of concrete taken out by one of the engineers who examined for the city, he says, "I consider it very poor concrete. I think I found three or four samples like that shown me here. In the absence of some evidence that they were only local conditions at the five openings, I would not recommend the acceptance of the work." As to the surface of the street, he says that he went over it very carefully in the fall after the paving was done, and "did not find any of the depressions which I find now." In answer to the general question as to whether or not the job of paving work is in substantial compliance with the specifications, the witness answered, "There are some points that are not in strict compliance, but, in a general way, the specifications are complied with." Each of the other engineers confirmed the statements of Wardell as to what was found to be the conditions in the openings made, and each in answer to the general question expressed it as his opinion that the work was in substantial compliance with the specifications. Comment on the evidence thus set out is unnecessary. The contract of the city called for materials and work done according to specifications, and under the directions of an experienced foreman. It is evident that the finished work sought to be turned over to it, did not answer the requirements of the contract. That for such reason it was the right of the city to reject the work and refuse to make payment cannot be the subject of question.

III. Coming now to further matters presented on the trial, and upon the facts of which the decree was wholly predicated, the issue between the plaintiffs and the defendant

5. SAME:
objection to
assessment:
estoppel.

contractors differs from that arising out of the cross-petition and the answer of the city thereto. And first as to the plaintiffs. In an amendment to their answer to the petition of the plaintiffs, the defendants Snouffer & Ford plead that all the matters complained of in respect to the character of the paving work was known to plaintiffs while the work was in process of con-

struction, and that they made no objection; further, that in response to the notice published pursuant to the resolution of the city council none of the plaintiffs appeared and filed objections addressed to the character of the work. And it is said that out of this situation an estoppel arose in favor of defendants in the face of which plaintiffs should not be heard to insist upon the matters of defect and failure now pleaded by them to prevent payment being made under the contract. It is not easy to see how an estoppel could thus arise. In the first place the individual property owners of the city cannot be held to a precise knowledge of the terms of the contract; the subject-matter was within the control of the city council, not only to make the contract, but to attend to its execution. And most certainly the individual property owners were under no obligation to stand about watching the work and make protest because of this or that according to their individual interpretation of the contract. The contractors were familiar with the provisions of the contract, and they owed the duty to the city and to each individual taxpayer to execute the work according to such contract. It would be a monstrous doctrine that would permit a recovery by them, notwithstanding conscious and flagrant violations of the contract, because, forsooth, some of the individual property owners, in passing by the work, observed the manner of its performance. No case can be found in the books to countenance such a doctrine.

Moreover, that an equitable estoppel bottomed on silence may arise, there must be not only a duty to speak, but the silence must amount to a legal fraud in that thereby the other party, ignorant of the truth, was misled into doing that which he would not have done but for such silence. If both parties know the truth, there can be no estoppel by silence. 16 Cyc. 759; 11 Am. & Eng. Ency. 434. But, if this were not so, the record before us makes disclosure of the fact that at various times different property owners, among whom were several of these plain-

6. SAME.

tiffs, did point out and make protest against the character of the materials used and of the work being done.

IV. As we have seen the cross-petition of the contractors against the city goes no farther than to allege the completion of the work by them, and the approval and acceptance thereof by the city. In an amendment there is alleged a demand in writing upon the city to proceed with the assessment and levy against the abutting property, and the issuance of certificates and improvement fund warrants as provided for in the contract. And it is said that the city and its officers have failed and refused to comply with such demand. A mandatory order is prayed, and such is granted by the decree. Answering the amendment, the city reiterated its denial that the work had been performed and completed according to contract, and its denial that such work had been approved and accepted. In view of what was said by us in *McCain v. City*, 128 Iowa, 331, it may be doubted if an approval and acceptance by the city council, if such there was, could avail the contractors anything as against the plaintiff property owners. And a decree in their favor would of course operate as a decree in favor of the present contention of the city.

But according to our reading, there was no approval and acceptance of the work by the city. The records of the city council were brought in, and therefrom it was made to appear that at the meeting in question there was present the mayor and five out of the six councilmen of which the council was composed. Upon the resolution to approve and accept, the yeas and nays were called, and three councilmen voted yea, and two nay. Thereupon, and before the announcement of the result, the two councilmen voting nay changed their vote to yea, stating at the time, and it being so entered in the record, that this was done for the purposes of a motion to reconsider, to be acted upon at the next meeting when all the members could be present. The record of the vote was then entered — yeas five, nays none. A motion was then made

7. PARLIAMENTARY
LAW: motion
to reconsider.

and seconded that the vote by which the resolution was adopted be reconsidered, and this motion was carried over to the next meeting. At the subsequent meeting there was present the mayor, and five councilmen; one of the members having in the meantime become a non-resident of the city, and his office having been declared vacant. The motion to reconsider was called up and put to a vote, resulting in three yeas and two nays. The mayor declared the motion lost, whereupon an appeal was taken, resulting in two votes to sustain and three to overrule. The mayor declared "the appeal was lost." It is a well-settled rule of parliamentary law that a motion to reconsider, if allowed, operates to abrogate the effect of the vote in question, "and the matter stands before the assembly in precisely the same state and condition, and upon the same question, as if the vote which has been ordered to be reconsidered had never been passed." Cushing's Manual, section 1265. And in the absence of a special rule on the subject, a motion to reconsider is to be regarded precisely like any other motion; it is allowed if a majority vote in favor thereof. *Id.* section 1266. It is immaterial that the mayor, in announcing the vote on the motion to reconsider, declared the same to have been lost. An erroneous, arbitrary announcement cannot have the effect to nullify the act of the majority of the city council. *Charlton v. Holliday*, 60 Iowa, 391.

No other questions are presented which require discussion at our hands. From what has been said, it follows that a reversal must be ordered upon both appeals.—*Reversed.*

TALCOTT BROTHERS, Appellees, v. CITY OF DES MOINES, ET AL., Appellants.

134	113
141	293
142	740

Grading of streets: CONSEQUENTIAL INJURY: DAMAGES: LATERAL SUPPORT. A city, in bringing to grade a street in which it owns the fee, may excavate in front of abutting property to an extent. Vol. 134 Ia.—8

tent that soil thereof loosens and slides into the street, thus requiring the owner to construct a retaining wall, without incurring liability for such consequential injury on the theory that it is a taking of private property without compensation; nor does the doctrine of lateral support as applied in cases arising between individuals have any application.

WEAVER, J., dissenting.

Appeal from Polk District Court.—HON. W. H. McHENRY, Judge.

TUESDAY, OCTOBER 23, 1906.

Rehearing denied Thursday, April 11, 1907

ACTION to recover damages for an invasion upon and injury to real estate. Plaintiffs are the owners of certain lots abutting on what is known as "State Street," in the defendant city. They allege that long prior to the matters complained of they had improved their said property, and this was done with reference to and in conformity with the natural surface of said street. Among other things, it is then alleged that in the year 1901 the city, by its officers and agents, entered upon said street and proceeded to make municipal improvements, and that in connection therewith, and particularly in front of plaintiffs' lots, the street was caused to be excavated up to the lot line to the depth of several feet. And plaintiffs say that their property was thereby invaded, injured, and damaged, in that, the lateral support to the soil having been removed, such soil for some distance on the surface back from the lot line became loose and slid down into the street, and that, in addition to the injury to the property arising directly therefrom, the expense of a retaining wall was made necessary. The pleading presents the conclusion that the acts of the city so had and done constituted a taking of their property without compensation being made therefor within the meaning of the Constitution of this State and of the United States. Re-

covery is asked on account of the diminution in the sale and rental value of the property, and for the expense of building a wall. The answer of defendant makes admission of the street excavation, but it is alleged that the work was done under proceedings authorized by statute, and was in all respects proper and legal; the object being to bring the surface thereof to the level of the grade regularly established for said street, and to permanently improve the same. The damage alleged by plaintiffs is accordingly denied. It is also denied that there was any violation of the constitutional provision invoked. To the answer a demurrer was interposed. The first six grounds thereof have relation to matters of allegation found in the answer concerning the title of the city to the fee of the street, and to the ordinances and proceedings under which the improvements in question were being proceeded with. As to all such grounds, the demurrer was overruled. The remaining grounds were as follows: "(7) It appears that in excavating the street there was removed the natural support of the adjacent soil to which plaintiffs were entitled of right, and the city thereby became liable for all damages to plaintiff's property thus occasioned. (8) It appears that by reason of the acts of defendant alleged the soil of plaintiff's property as the same was left by excavation was thereby caused to crumble and slide into the street, and there was accordingly a physical invasion of plaintiff's property and a taking thereof without making due compensation as provided by the Constitution." Upon these grounds the demurrer was sustained. From the ruling so far as adverse, the defendant city appeals.—*Reversed.*

W. H. Bremner, M. H. Cohen, and R. B. Alberson,
for appellants.

George H. Lewis, for appellees.

BISHOP, J.—I. There has come to us with the record in the case what are denominated "briefs" and "arguments" addressed to a cross-appeal by the plaintiffs. The

record does not show that any such appeal was taken. Since the submission of the case, there has been filed with the clerk a statement on the part of the attorneys for the city to the effect that a timely and legal notice of cross-appeal was served upon them, but that, in preparing the record for this court, they failed by oversight to include the same in such record. If this method of record presentation could be approved, still it must be said that there is nothing before us to indicate that any such notice was served upon the clerk of the court below. This was essential to the appeal. Following the statute, and under our repeated holdings, we are without jurisdiction to entertain the cross-appeal. Code, section 4114; *Names v. Names*, 74 Iowa, 213; *Plummer v. Bank*, 74 Iowa, 731; *Clayton v. Sievertsen*, 115 Iowa, 687.

II. The constitutional provision invoked by plaintiff — section 18 of the Bill of Rights — declares that private property shall not be taken for public use without just compensation first being made. And it will be observed that the precise ground of the ruling of the trial court complained of was that on the facts alleged, of which the answer made admission, a case of wrongful taking of private property within the meaning of the Constitution was made out. It is the correctness of this ruling that is made the subject of argument, and we shall confine our attention thereto. To begin with, it is no doubt the general rule that every owner of soil has the right to a continuance of the lateral support afforded thereto in a state of nature by the soil of his neighbor. The right is one of property, and the owner may restrain any threatened interference therewith, or, if deprived thereof, he may have recovery in the way of damages. The cases in which the doctrine is announced are extensively collected in 1 Cyc. 775 *et seq.*, and we need not stop for further citation. And, on general view, we perceive no good reason for making any distinction between those cases involving the question of lateral support where a municipality is a party and those in which the rights of individuals simply are

brought forward for consideration. It becomes manifest upon examination and reflection, however, that, when dealing with the subject-matter as related to the improvement of streets in municipalities, we are not given the situation which obtains ordinarily in cases arising between individual adjoining owners. A municipality takes title in fee to streets by authority of statute, and for a specific purpose. Having acquired title, it becomes its right — and, not only that, but subject to some qualifications as to time and manner, its duty — to “improve and repair.” Code, section 751. Now, it is apparent to every observing man, and hence must have been to the Legislature, that a system of streets constructed to meet the requirements of the public is not possible in the average municipality by conforming strictly to the natural surface of the soil. There must be a cut here and a fill there. When, therefore, municipal authority was granted to acquire land for and to lay out streets, there was annexed the general power to establish grades and to improve in accordance with such grades. Code, sections 751, 782. And it has never been doubted but that within the contemplation of the statute the right to grade and improve is coextensive with the limits of the street. *Gallaher v. City of Jefferson*, 125 Iowa, 324. Title as for a street being present, the municipality may not only enter upon and proceed to improve, but, in the language of the cases, the character and extent of the improvements to be made, as of grading, etc., is for the exclusive determination of the municipal authorities. The courts will not interfere with their action unless fraud or oppression is made to appear. *Dewey v. Des Moines*, 101 Iowa, 416.

As a matter of statute, it is nowhere provided that damages may be recovered by an abutting property owner occasioned by the work of bringing the surface of a street to the grade as originally established therefor. And, except in cases where a physical trespass and taking possession of the soil has been made to appear, or we have

been presented with allegation and proof of negligence in respect of the manner of doing the work, we have steadily refused to recognize any such right as existing at common law. *Creal v. Keokuk*, 4 G. Greene, 47; *Cotes v. Davenport*, 9 Iowa, 227; *Russell v. Burlington*, 30 Iowa, 262; *Hoffman v. Muscatine*, 113 Iowa, 332; *Reilly v. Ft. Dodge*, 118 Iowa, 633. It is to be observed, however, that in no one of our cases giving sanction to a recovery, was the right bottomed on the lateral support doctrine. And the subject-matter was not presented to the court or discussed in opinion as involving any question of constitutional right. In *Creal v. Keokuk*, the injury complained of consisted in plaintiff being compelled to raise his store building to conform to a grade established by the city for the street. The ground of the denial of a right of recovery was twofold. After speaking of the necessity for and benefits of municipal corporate organization, it is said in the opinion that every man who becomes a citizen of the municipality becomes a member of the corporation, and consents to the provisions and powers as well as the liabilities contained in the charter. One of these provisions authorized the grading of streets. "This," it is said, "was agreed to by the parties to the compact, and considered essential to the enjoyment of property and advancement and prosperity of the city. . . . It being for the mutual benefit of all that this power should exist and be incorporated into the charter, and the grading of the streets being necessary for the convenience of all, every man surrendered for his own good all objections to the prudent exercise of this power." The court then goes on to the further pronouncement that with title to the fee of the street there passed to the city as by grant the right to do all those things reasonably necessary to make it safe and convenient for the required purpose. In each of our cases which follow, the conclusion reached in *Creal v. Keokuk* finds approval without discussion. Counsel for appellees has not in argument taken note of these cases, and

this, we assume, on the theory that the filling of a street within its borders does not amount to a taking of the abutting property or any part thereof, and hence the cases are not in point. Whether this is so or not, we shall have occasion to treat of on a later page of this opinion.

The general subject has, with more or less frequency, been dealt with by the courts elsewhere, and examination discloses that not a little conflict exists in the cases and among the text-writers. Within proper limits, we can do no more than to call attention in a partial way to what has been said on the subject. The English cases, and, almost without exception, the earlier cases in this country, hold to the doctrine of nonliability for damages variously denominated as "indirect," "incidental," or "consequential," arising out of the making of street improvements. Of these a leading American case is *Callender v. Marsh*, 1 Pick. (Mass.) 418. There the case was for digging down the street in front of plaintiff's dwelling house and taking away the earth, so as to lay bare the foundations of the house and endanger its falling, in consequence of which the plaintiff was obliged to build new walls, etc.—a case in its facts, as will be seen, very similar to the one we have before us. The defendant, a street officer of the city, pleaded the statute authorizing the work of grading streets, and to this the plaintiff made reply that the statute was in excess of constitutional authority in that according to a provision of the Declaration of Rights no property of an individual can be appropriated to public uses without reasonable compensation being made therefor. In refusing to make application of the constitutional provision, the court said: "There has been no construction given to this provision which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense by means of the right use of property already belonging to the public. It has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government." Finding that the

street had been properly laid out, the court proceeded to say further: "He who sells [to the city] may claim damages, not only on account of the value of the land taken, but for the diminution of the value of adjoining lots, calculating upon the future probable reduction or elevation of the street. And all this is a proper subject for the inquiry of those who are authorized to lay out, or of a jury if a party should demand one. And he who purchases lots so situated for the purpose of building upon them is bound to consider the contingencies which may belong to them." And this language was quoted with approval in the opinion in *Creal v. Keokuk*. Following this came the case of *Radcliff's Ex'rs. v. Mayor*, 4 N. Y. 195 (53 Am. Dec. 357). There, also, the case arose out of a street excavation whereby the soil of plaintiff's lot was caused to fall. A recovery was denied on the ground that the defendants were acting under authority conferred by the Legislature to grade, and were not answerable for the consequential damages sustained by abutting owners; the statute having made no provision for the payment of such damage. In the course of the opinion it is said: "Our Constitution provides that private property shall not be taken for public use without just compensation. But I am not aware that this, or any similar provision in the Constitutions of other States, has ever been held applicable to a case like this. Although plaintiff's property has suffered damage, I find no precedent for saying that it has been taken for public use within the meaning of the Constitution." This case was cited in approval in the late case of *Uppington v. New York*, 165 N. Y. 222 (59 N. E. 91, 53 L. R. A. 550). The question presented in *Mayor, etc., v. Omberg*, 28 Ga. 46 (73 Am. Dec. 748), was in all respects similar. It was there said: "It being conceded that these proceedings are regular, that what has been done it was lawful to do, and the corporation not having transcended its authority, our conclusion is that, although the plaintiff has been injured, it is *damnum absque injuria*. People pur-

chase property and build in towns with full knowledge of public necessity to level streets by excavating or elevating as the case may demand; and they must take the chances and the consequences." And, further: "It cannot, we think, with any propriety be contended that this is taking private property for public use." In *M. E. Church v. City*, 31 Kan. 721 (3 Pac. 527), another excavation case, it was held that in the absence of any express provision of statute on the subject, a city cannot be made liable for incidental injuries arising from the exercise of its continuing authority to make changes in the grade of its streets; that in such there is no taking of private property for public use. In *Taylor v. St. Louis*, 14 Mo. 20 (55 Am. Dec. 89), the damage arose out of the excavation of an alley causing the soil of plaintiff's premises to cave in. It was held that here was not an exercise of eminent domain so as to require compensation. *Northern Trans. Co. v. Chicago*, 99 U. S. 635 (25 L. Ed. 336), was a case for damages growing out of an interference with access to plaintiff's property by a work of public improvement. And it was said: "That persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike in England and in this country." After citing several cases, among others *Callender v. Marsh*, the court proceeds: "The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the Constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." In *Smith v. Eau Claire*, 78 Wis. 457 (47 N. W. 830), the damage sought to be recovered was for an elevation of the street surface.

The doctrine of nonliability for consequential damages was declared for, and the court adds: "The principle upon which the rule is based seems to be that the purchaser of a lot upon a street is supposed to calculate the chances that the grade of the street may be changed, and such contingency is an element which affects the price he pays for the lot." *Fellows v. New Haven*, 44 Conn. 240 (26 Am. Rep. 447), was an excavation case, and, as here, the complaint was of the sliding in of the soil of the abutting lots. A recovery was denied, and the holding was put on the ground that an injury of the character alleged must have been contemplated when the street was laid out, and damages consequent thereon must have been considered and compensation made or waived at such time. The foregoing reference to particular cases will be sufficient to indicate the trend of judicial decision. If the reader cares to exploit the subject further, he will find the cases well collected in Dillon on Municipal Corporations, section 989 *et seq.* and notes; in Cooley on Constitutional Limitations, 251 (note); in Lewis on Eminent Domain, section 92 *et seq.*, and notes, and in Abbott on Municipal Corporations, section 810 (note). See, also, the exhaustive dissenting opinion of Mr. Justice Hoyt in *Parke v. Seattle* 5 Wash. 1 (31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68, 34 Am. St. Rep. 839).

Judge Dillon, in discussing the subject in his work (section 989), says: "In view of the nature of the streets and of that control over them which of right belongs to the State, and of the nature of the ownership of lots bounded thereon, which implies subjection, if not consent, to the exercise and determination of the public will respecting what grades or changes in grades thereof shall, from time to time, be found necessary, and what other improvements thereon or therein (within the legitimate purposes of streets) shall be found expedient, it results, we think, that adjoining property owners are not entitled of legal right, without constitutional or statutory aid, to compensation for damages

which result as an incident or consequence of the exercise of this power by the State, or the municipality by delegation from the State." And in section 992 he states it as his conclusion that, although adjoining property may suffer indirect or consequential damages as a result of street improvements, still it is not, in a constitutional sense, taken for public use. Judge Cooley in his work on Constitutional Limitations, p. 253, sums up his view of the subject thus: "If a city . . . orders and constructs public works from which incidental injury results to individuals, . . . an action will not lie for such injury. The reason is obvious. The maintenance of such an action would transfer to court and jury the discretion which the law vests in the municipality, but transfer them not to be exercised directly and finally, but indirectly and partially by the retroactive effect of punitive verdicts upon special complaints."

Of the cases which announce a rule at variance with the class of which those cited above stand as examples are the following: *Stearns v. Richmond*, 88 Va. 992 (14 S. E. 847, 29 Am. St. Rep. 758); *Parke v. Seattle*, 5 Wash. 1 (31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68, 34 Am. St. Rep. 839); *Dyer v. St. Paul*, 27 Minn. 457 (8 N. W. 272); *Damkoehler v. Milwaukee*, 124 Wis. 144 (101 N. W. 706). And the Ohio cases of which *Keating v. Cincinnati*, 38 Ohio St. 141 (43 Am. Rep. 421), is a type. The Ohio cases have from the beginning consistently declared for a liability doctrine, not on constitutional grounds, but upon the general principle as expressed in the maxim "*Sic utere tuo*," etc. For the other cases it must be said that in no one of them was the decision made to rest on strict constitutional grounds. In each thereof the court was called upon to deal with a condition of peculiar hardship arising out of the withdrawal of lateral support in making a street excavation. And while the doctrine of non-liability for consequential damages as summed up by Judge Dillon, *supra*, was not impugned — on the contrary, adherence thereto was expressly announced in the Wisconsin and

Virginia cases — the several decisions were put upon the ground that the rule of lateral support as it obtains between individual landowners should obtain between a municipality and an abutting lot owner. And in this view, Mr. Lewis, in his work on Eminent Domain, section 101, concurs. Another class of cases cited to our attention may properly enough be taken note of. It has been variously held, both in this State and elsewhere, that a municipality may be charged as for a taking in the constitutional sense where in making a street fill the earth at the base of the embankment is permitted to encroach upon the abutting property. Of these cases *Hendershott v. City of Ottumwa*, 46 Iowa, 658, furnishes a sufficient example. It was there decided that the city had no right in making an embankment to enter upon plaintiff's lot and deposit earth thereon, and that it made no difference whether the deposit was directly made, or that the earth was permitted to roll down the sides of the embankment in such manner that it passed at once upon the lot. In either event, it would amount to an encroachment on the soil of the lot, and hence a direct trespass. In closing the opinion the court said: "We need not determine whether a city is liable for digging to the line of a street by which the soil upon the adjoining land is caused to fall, to the damage of the owner. There is a clear distinction between such a case and the case at bar. In making an excavation to the line of the street, there is no encroachment upon the adjoining land. The injury is not direct and immediate. It depends upon the lapse of time, the action of the elements, the depth of the excavation, and the character of the soil." It may be said in passing that, following the case thus cited, and furnishing a legislative view of the subject, came the act of the 25th General Assembly, now Code, section 784, which provides that cities of the first class in addition to the right to purchase shall have the extraordinary power to take by condemnation proceedings so much of the abutting lands as may be necessary to the construction of a street fill, to the end that the

street, when brought to grade, shall be of uniform surface to the full width thereof as laid out. Upon the abutting property being brought to grade the city shall reconvey to the owner upon repayment of the original purchase or condemnation price.

Still another class of cases are cited on the brief of counsel for appellee, of which mention only need be made. In several of the States a change has been made in the form of constitutional expression, so that as now existing the mandate forbids, not only the taking of private property, but declares that it shall not be injured or damaged. Expressly based on such a provision, it has been variously held that for indirect injuries or consequential damages caused to abutting property by the making of street improvements a recovery may be had. We shall not attempt a discussion as to the soundness of the conclusion reached in these cases, because manifestly enough they cannot be accepted as authority, where, as in this State, no such constitutional provision exists.

With the general state of authority before us, we come to consider what shall be the rule adopted for the determination of the instant case. The question is of much importance because common observation teaches that the facts as disclosed by the petition are not unusual in practical experience. In most of the cities and towns of this State grading work is necessary to the convenient use of streets, and elevations and excavations are frequent. As the question is presented to us it may be divided thus: (1) Must it be said that in the case of a street excavation which has resulted in the caving in of the soil of the abutting lots along the street line there has been a taking in contravention of the provision of the Bill of Rights? (2) If not a taking in the constitutional sense, then shall the rule of our former cases be repudiated and the lateral support doctrine as the same has application in cases arising between individual owners be made to govern?

Quite naturally we address ourselves first to the constitutional question. It should be kept in mind in this connection that plaintiffs do not complain as of a direct and physical invasion upon their soil. They are not seeking to recover the value of the earth which caved off into the street. Their action is for damages to their premises as a whole, in the respect that the convenience of use has been destroyed in part, and the sale and rental value diminished. Now, as a general proposition, it would seem that there can be no disturbance of or interference with the property rights of an abutting owner without involving to some extent a taking. The right to light, air, of access, to be free from nuisance, etc., as well as the right of lateral support, are property rights, and it follows as matter of course that he who deprives the owner thereof in any degree is guilty of a taking. If without right, he may be held answerable. And, reasoning from one point of view, there can be no difference whether the taking is by an individual or by the public. It is manifest, however, that in many respects the relations existing between individuals, separately considered, cannot be accepted as in all respects the correct measure to judge of the relations between the citizen and the municipal body of which he is a part. In every citizen there is vested dual rights,—those individual to himself, as of life and property, and those which concern the general public of which he is a part. The former he may defend as against every other citizen, but it is the very essence of government, and fundamentally so, that private rights shall at all times be held subordinate to the public good. And to this every citizen is held, as by imperative decree, to have given his consent. Hence it is that reduced to a last analysis the Bill of Rights is no more than a bill of favors. It follows that whoever associates himself with the community in legal contemplation proclaims primary allegiance to the common good of that community as within bounds it finds expression in the voice of constituted authority. And his rights are those that the law gives

him. One of those rights, as we have seen, is that property accumulated by him shall not be taken for the use of the public without compensation. But with consistency this grant cannot be given force according to a literal reading of the language used. Thus it has never been considered that every property right conceivable, nor every possible taking, was included in the grant. And it could not well be. It would be subversive of public interests in the highest degree, and wholly intolerable, if every act done in the name of the government which should have effect, near or remote, to restrict or impair individual property holdings, could be made the basis of a legal demand for compensation. A recovery of damages for an injury which is merely an incident of community life, or which flows from the general and necessary operations of government, must be regarded as waived in virtue of the compact existing between the individual and the public, and, so considered, the force of reasoning in the statement respecting the subject as quoted from Judge Dillon becomes fully apparent. It is in this view that courts in giving construction to the Constitution have held almost universally that there can be no recovery for indirect or consequential damages resulting from a work of public improvement. As applied to such cases, and to maintain a harmonious balance, the Constitution must be construed to mean not only that the taking must be direct, but it must amount to an actual invasion and appropriation of the abutting property or of some part thereof in such manner as to deprive the owner of the use thereof, as was complained of in *Hendershott v. Ottumwa*, *supra*. See the cases cited foregoing, and, generally on the subject, Cooley on Constitutional Limitations, 666. Also the cases collected in 8 Words and Phrases, 6852. To say otherwise would be to practically tie the hands of the State, acting through its municipalities, and prevent the making of most, if not all, those improvements which are universally considered essential, not only to the comfort and convenience of individual members

of the general public, but to the growth and development of our cities and towns. Not a street, park, or other public place could be opened, improved, or vacated; not a bridge, levee, market house, or other public building could be built, put into use, abandoned, or torn down, except upon payment of damages to every property owner making proof that the use of his property was being interfered with, or that the value thereof, in whole or in part, had thereby suffered or been taken away. Thus that one who suffers inconvenience in the use of his property, or loss in the value thereof, by reason of the vacation of a public street, cannot recover damages therefor on the ground that such constitutes a taking for public use, see *Barr v. Oskaloosa*, 45 Iowa, 275, and cases cited. Looking, now, to the case as here made by plaintiffs, it is clear that they have suffered no physical invasion or appropriation of their premises, nor have they been deprived of the free use thereof from one boundary line to the other. The city had the right, as we have seen, to make the excavation, and, had the soil been such as that the earth wall would have remained standing, by all the authorities there would have been no injury for which damages could be recovered. As it is, by combined force of what was rightfully done by the city, and the operation of a law of nature, plaintiffs have been deprived not of the possession, use, and control of their premises, but — and this is the extreme — of a quantity of earth from along the margin of the lot. And in saying this we do not overlook the fact that plaintiffs allege the necessity for the building of a retaining wall. That fact could only be considered, if at all, as an element of damage following a finding that there had been an actionable taking.

But we need not rest our holding for nonliability in cases like the one before us wholly on the ground as above stated. And in our further consideration we shall not be met with any question of constitutional right. Within our view the reasoning in *Callender v. Marsh*, *supra*, and ap-

proved in *Creal v. Keokuk*, to the effect that the grant to the city, whether by dedication, by condemnation, or purchase, carried with it the right to injure, if this need be in reason, the abutting property in making such improvements as the necessity of public travel should reasonably require, is unanswerable. And, indeed, in no one of the cases holding to the liability doctrine was there a serious attempt made to answer it. At the time, the landowner knew, of course, the purpose for which the city was acquiring the land, and that sooner or later the making of improvements would be entered upon. If his land was situated on a hilltop or in a ravine, he knew that when improvements came to be made there would be necessity for excavations and fills, and he must be held to have taken this into consideration when he made the dedication, or fixed the price on sale, or made his claim for damages on condemnation proceedings, as the case may have been. And the conclusive presumption must be indulged not only that the city in accepting of the dedication, or in paying the purchase or condemnation price, understood that there was included in the grant the right to inflict indirect injury, if necessary to a proper work of improvement, but that there was in fact included in the consideration for the grant compensation for such injury as might be reasonably expected to follow. And, this being true, it would be unjust in the extreme to permit a grantor to thereafter stand upon the position that having transferred to the city either by way of dedication, or for the highest price obtainable, he secretly reserved the right to sue for and recover a further sum as damages to his property when improvements should be undertaken, and this on the basis of its valuation, enhanced, it may be, a hundredfold, as of the time of the making of such improvements. It is plain, also, that one holding as a purchaser from such grantor would be in no different position. He must be held to have taken with knowledge and to have been governed in making his purchase accordingly. And this conclusion is of itself amply sufficient

to support a finding in the case against the contention of the plaintiffs.

This leaves as the phase of the subject remaining to be considered the question whether we shall depart from the rule of our former cases and announce a liability rule, either predicated upon the general maxim "*Sic utere tuo*," or by holding that to cases such as we have before us the doctrine of lateral support should be given specific application. This we are wholly unwilling to do. Apart from the doctrine of *stare decisis*, to which we should be disposed to yield in the absence of any other reason, it must be manifest from what we have said on the foregoing pages of this opinion that a departure could have but one result, and that is the working out of positive injustice. And if it must be presumed, and that is what we hold, that compensation for injuries resulting from a proper exercise of power in making street improvements was either waived or paid, according as the city acquired the fee of the street by dedication or through private or condemnation sale, then it can require no argument to make evident the injustice should payment of a further sum be decreed as of the time of making the improvement, and the amount thereof to be determined with reference to the conditions then existing.

This opinion is already overlong, and we shall not attempt to pursue the subject further. It follows from what we have said that the court below was in error in its ruling sustaining the demurrer as appealed from. *Reversed*.

WEAVER, J., dissents.

HENRY LEONARD, Claimant, Appellant, v. BRIDGET LEONARD, Admrx. of the Estate of J. W. Leonard, deceased, Appellee.

Estates of decedents: CLAIMS: PROOF. One who pleads an express written agreement as the basis of a claim against an estate cannot recover upon proof of an oral agreement.

Appeal from Fayette District Court.—HON. A. N. HOBSON, Judge.

THURSDAY, APRIL 11, 1907.

PROCEEDINGS to establish a claim against the estate of J. W. Leonard, deceased. From an order disallowing the claim, plaintiff appeals.—*Affirmed.*

Charles E. Ransier, for appellant.

W. B. Ingersoll, for appellee.

DEEMER, J.—The case involves nothing but a question of fact; the rules of law applicable thereto being well settled and equally well understood. Plaintiff filed a claim against the estate of J. W. Leonard, deceased, in which he alleged that said Leonard, in consideration of the transfer of a certain tract of land to him by one Matthew Leonard, also deceased, agreed to pay plaintiff when he should arrive at the age of forty years the sum of \$400; and that this agreement was in writing signed by said James W. Leonard. This claim was denied by operation of law. There was, perhaps, enough testimony to show that James W. Leonard at one time received a deed from Matthew Leonard for certain lands, and that, as part of the consideration therefor, he

(James W.) agreed to pay Henry something like \$400. This agreement was either in the form of a note or contract, but was never delivered to Henry, and was afterward destroyed. Thereafter new papers were drawn, but it is not sufficiently shown that any written agreement was made, or, if made, that it was ever delivered so as to become effective. As plaintiff is relying upon an express agreement, he must prove it, and this, as we think, he has failed to do. Having pleaded an express written agreement, he cannot recover upon proof of an oral one. This is fundamental doctrine, needing no citation of authority in its support. At most, there is a mere inference of a parol agreement with reference to the payment of some money in consideration for a deed to the land, and this is not sufficient to justify a recovery under the allegations made in support of the claim.

The judgment of the district court seems to be correct, and it is *affirmed*.

JOHN A. SAUNDERS, Appellant, v. THE CITY OF IOWA CITY, GEORGE W. BALL, Mayor, A. J. HANLEY ET AL., Members of the City Council of said City, and WILLIAM HORRABIN, Appellees.

Contracts for street improvement: USE OF PATENT PAVEMENT: COMPETITIVE BIDDING: INJUNCTION. A contract for a street improvement which is let to the lowest bidder is not in violation of the statute relating to competitive bidding by reason of the fact that the council, in its resolution authorizing the improvements and its advertisement for bids, required the use of a patented pavement.

Appeal from Johnson District Court.—HON. O. A. BYINGTON, Judge.

THURSDAY, APRIL 11, 1907.

SUIT in equity to enjoin defendants from making certain improvements by paving a street in defendant city, from letting a contract for said paving to defendant Horrabin, and from assessing the cost of said improvement to abutting property owners. The trial court dismissed the petition, and plaintiff appeals.— *Affirmed.*

Baldwin & Fairchild and Read & Read, for appellant.

W. J. McDonald, Bailey & Murphy, and M. J. Wade, for appellees.

DEEMER, J.— The question of paving what is known as “Iowa Avenue” in the city of Iowa City became a matter of public concern, and the city council of that city undertook an investigation as to the best material to be used for that purpose. Pursuant thereto it instructed its engineer to make an investigation, and as a result thereof he recommended the use of what is known as “Bitulithic pavement.” Brick was discarded for various reasons which need not be enumerated, and this left nothing but asphalt or bitulithic for use in improving the street. After the engineer had made his report a majority of the owners of property abutting upon the street petitioned the city council, asking it to curb and pave the thoroughfare, and recommended that the bitulithic pavement be used. Plaintiff, however, did not join in this petition. Pursuant to the petition the council passed a resolution for the pavement of the street, and directed its civil engineer to prepare plans and specifications for the work, and the city clerk was authorized to advertise for bids for paving the avenue with Warren Bros.’ bitulithic pavement. This was done, but before any bids were received the Warren Bros. Company filed with the city council the following statement:

To the Mayor and City Council, Iowa City, Iowa.
Gentlemen: Inasmuch as it is deemed advisable by the

proper authorities that certain streets in the city of Iowa City, State of Iowa, should be improved with Warren's bitulithic pavement, and inasmuch as the construction of said pavement requires the use of certain patented processes and compounds, and inasmuch as competitive bidding in the letting of contracts for street improvements is deemed advisable, in order to provide for such competitive bidding, and at the same time secure the adoption of Warren's bitulithic pavement as the kind of pavement to be constructed in such streets as may hereafter be determined, the undersigned, Warren Bros. Company, as owners of all patents and processes covering the laying of said bitulithic pavements, hereby propose and agree for the consideration hereafter named to furnish to any bidder to whom a contract may be awarded to pave any street or streets in the city of Iowa City with Warren's bitulithic pavement, and who shall enter into a contract with such surety or sureties as may be required by said city of Iowa City, the following materials ready for use, coupled with a free license to use any or all patents owned, or which may hereafter be owned by Warren Bros. Company, necessary to lay said pavement: (1) The necessary roadway mixture of the wearing surface having a thickness of two (2) inches after compression, prepared under the patented process of Warren Bros. Company, and delivered hot in the wagons of the contractor and the bitulithic mixing plant located in the city of Iowa City. (2) The right to use any and all patents owned or controlled by Warren Bros. Company, which are necessary to be used in the laying of such pavement. (3) The bituminous flush coating cement and stone chips for coating the wearing surface delivered on wagons of the contractor at the bitulithic mixing plant located as above. (4) We will also furnish to the successful bidder, or to the city, at our expense, an expert who will give proper advice as to the building of such pavement. (5) We will make at least two examinations daily at our laboratory of the mixtures as delivered on the street to see if uniformity has been accomplished in the mixture and construction, and make reports thereon to the proper city authorities, said samples to be sent prepaid to the laboratory of Warren Bros. Company, Potter street, East Cambridge, Mass., by the city or contractor. The price at which this service is offered to any and all contractors who make a bid on Warren's bitu-

lithic pavement in the city of Iowa City, State of Iowa, is \$1.45 per square yard of finished pavement. Respectfully submitted, Warren Bros. Company, Albert C. Warren, Vice President.

This statement was dated May 15th, but was not filed, as we understand it, until May 26, 1905. The time fixed for hearing objections to the resolution for paving was May 5, 1905, and before that date plaintiff and others filed protests against the improvements, which were finally overruled on May 5th, and at that time the resolution to pave with the bitulithic substance was passed. Pursuant to the advertisement for bids, six were filed, ranging from \$1.96 to \$2.16 per square yard. The bid of the Barber Asphalt Paving Company being the lowest, it was awarded the contract on June 23, 1905. By the terms of that contract the asphalt company was to begin work within fifteen days after the agreement became binding. As the Barber Company did not comply with this part of the contract, it was canceled on July 14, 1905, and the clerk was directed to readvertise for bids. This was done, and at the time fixed for the receipt of the second bids three were received ranging from \$1.98 to \$2.20 per square yard. Defendant Horrabin being the lowest bidder the contract was awarded to him, August 16, 1905. Thereafter the time given him for commencing the work was extended to April 15, 1906.

This action to enjoin defendant city and its council from entering into a contract with Horrabin and to declare any contract made with him void and for other purposes was commenced in July of the year 1905. Both the contract with the Barber Asphalt Company and with Horrabin provided that the paving be laid with Warren Bros.' bitulithic pavement, to be purchased from Warren Bros. Company, and mixed with Warren's Puritan brand No. 21 bituminous water-proof cement or bitulithic cement, the wearing surface to be spread with Warren's quick-drying bituminous

flush coat composition; and the contract with Horrabin also contained these provisions:

The several sizes of stone thus separated by the screen sections shall pass into a bin containing six sections or compartments. From this bin the stone shall be drawn into a weight box resting on a scale having seven beams, the stone from each bin shall be accurately weighed in the proposition which has been *previously determined by laboratory tests to give the best results*, that is, the most dense mixture of mineral aggregate, and one having inherent stability. From the weight bin each batch of mineral aggregate, composed of differing sizes accurately weighed as above, shall pass into a "twin plug" or other approved form of mixer. To this mixture shall be added a sufficient quantity of *Warren's Puritan brand No. 21 bituminous water-proof cement, or bitulithic cement*, to thoroughly coat all the particles. After rolling the wearing surface, there shall be spread over it while it is still warm a thin coating of *Warren's quick-drying bituminous flush-coat composition*, by making a suitable flush coat spreading machine. . . . As a condition precedent to the acceptance by the council of the work done under the contract, it is hereby stipulated and agreed that Warren Bros. Company must file with the city clerk a statement duly attested, setting forth the fact that they, the Warren Bros. Company, have furnished the contractor with a full and sufficient amount of the proper bituminous compounds and mixtures for properly building the amount of paving constructed under this contract; that they have made laboratory tests of the stone used in the bitulithic mixtures, and have given instructions to the contractor with reference to the mixing of stone and bituminous cement; that they have examined from time to time the mixture as it was prepared to be placed on the street; that they have exercised a general supervision over the bituminous construction of the pavement, and believe that the work has been well done and to their entire satisfaction; and that they have no claims against the city of Iowa City for furnishing such material, rendering such services, or the use of any patented device, process, or compound.

As will be observed the action was commenced before the contract with Horrabin was let, and the letting of the

contract, as well as the making of the improvement and the making of any assessment for the cost thereof, is sought to be enjoined, and the cancellation of the contract is also asked. Appellant relies on the following propositions:

(1) The defendant city was and is without jurisdiction or power to make the improvement in controversy, or to let the contract in controversy, or to assess any part of the cost of the improvement to abutting property, for the reason that the statute of Iowa and the ordinance of the defendant city are mandatory in requiring competition, and there was and could be no competition in the letting in controversy. (2) The defendant city was and is without power or jurisdiction to improve the street in question by paving with Warren Bros. bitulithic pavement, or to let the contract in controversy therefor, or to assess the cost of the improvement to abutting property, for the reason that the pavement specified was a patented process, the manufacture and laying of which was controlled by the letters patent, owned exclusively by the Warren Bros. Company, and therefore there was and could be no competition in the letting of said improvement as required by the statute and ordinances regulating the same.

It is conceded that the Warren Bros.' bitulithic pavement is a patented process, and we have now for the first time to determine whether a city may, in improving its streets, make use of a patented process or substance. Upon no proposition is there such a decided and irreconcilable conflict in the authorities from other States as upon this. It is absolutely impossible to reconcile the cases, and the several courts have not always been consistent in their pronouncements upon the principles involved. Before going to the main proposition, it may be well to consider our statutes so far as they may be deemed relevant to the inquiry. By section 753 of the Code it is provided that the city council shall have the care, supervision, and control of all public highways, streets, and alleys, and shall cause the same to be kept open and in repair. By section 792, "cities shall have the

power to improve any street by paving and curbing the same or any part thereof, and to provide for the making and reconstruction of such street improvements, and to assess the cost to abutting property." And by section 813 it is provided that all contracts for the making or reconstruction of street improvements and sewers shall be let in the name of the city to the lowest bidder by sealed proposals upon giving notice for at least ten days by two publications in a newspaper published in said city, which notice shall state as nearly as practicable the extent of the work and the kind of materials for which bids will be received, when the work shall be done, the terms of payment fixed, and the time proposals shall be acted upon; but all bids may be rejected and new bids ordered. The ordinance of the defendant city closely followed section 813 of the Code, and is in almost the exact language of that statute. It has long been the policy of the State to secure competition in letting contracts for public supplies. Thus section 867 of the Code requires certain contracts on behalf of cities to be let to the lowest bidder. Boards of supervisors are also required in making contracts for the support of the poor to let to the lowest bidder. Section 2238. School boards must let contracts for repairs of schoolhouses to the lowest responsible bidder. Code, section 2779. And the board of control must let all contracts for supplies to the lowest bidders. Code Supp. 1902, sections 2727-a50 to 2727-a51. Other cases need not be enumerated, as enough is stated to show the policy of the State in this regard.

The broad claim is now made that where there can be no competition, as where there is a natural or artificial monopoly, no matter how created, whether, in the source of supply, by agreement, or because of a patent, the article thus monopolized cannot be used by the State or any of its instrumentalities, or by a city in the making of public improvements. Appellant will admit of no distinction as to the nature of the monopoly, and his counsel start out with the

proposition that all monopolies are odious in law, and no matter if that monopoly be created by act of Congress, as where it grants a patent, a city cannot use a patented article in making public improvements. Plaintiff admits, as he must, that the city council determines the nature of the pavement to be constructed in order that there may be intelligent bidding and the exercise of a choice as between good and bad substances for paving, but he says that no selection of a patented article may be made, no matter what its character. The admission involved in this statement is necessary, in view of our holding in *Coggeshall v. City of Des Moines*, 78 Iowa, 235, wherein it is said that the city must determine in advance of advertising for bids and letting the contract the character of the work and material of which the improvement is to be made. Within proper limits this determination is conclusive upon the courts in the absence of fraud or wanton oppression. *Morrison v. Hershire*, 32 Iowa, 272. But if the council has no authority to contract for the use of a patented or monopolized article, then, of course, its determination to use it is not conclusive, no matter what the motive of the officials selecting it. We are brought then squarely to the proposition — may a city in its resolution of necessity and conclusion to pave a street select a patented article or process? If it may not, then the trial court was in error in dismissing the petition. But if it may, then the case was properly decided. There are many cases *pro* and *con* on this proposition, and it is difficult to say where the numerical weight of authority is. We shall refer to some of the cases and to the views therein expressed during the course of this opinion, but before doing so, it is thought advisable to consider a matter of legislative construction, which is strongly relied upon by appellant. By the acts of the Twenty-Third, Twenty-Fourth and Twenty-Fifth General Assemblies, chapters fourteen, twelve and seven, respectively, cities had power to use any composition patented or otherwise, for the curbing and paving of

streets. Thus the matter stood until the present Code was adopted, when the language was changed so that the character of material which might be used was left undefined. The commission appointed pursuant to chapter 115, Acts 25th General Assembly, to revise and codify the laws of Iowa, omitted that provision from its reports, but according to its printed report (page 3 thereof), it did not, in omitting the provision as to the use of patented articles, intend to change the meaning of the law. See, also, *Minneapolis R. R. v. Cedar Rapids R. R.*, 114 Iowa, 502; *Eastwood v. Crane*, 125 Iowa, 707.

Under the Code as it now stands the city counsel shall declare the advisability or necessity of paving, and state the kind of material proposed to be used and the method of construction. See section 810. But it is said that the act as it now appears is not the same bill as that recommended by the Code Commission, and this is no doubt true. It seems that the bill which was finally enacted was a committee substitute, but in so far as the provision now under consideration is concerned, there is no material departure from the language used by the Code Commissioners in the bill recommended by it. Compare section 810 of the Code with section 19 of the proposed act found on page 162 of what is known as the "Black Code." As the matter now stands there is no express permission to use patented articles; nor is there any prohibition save as such inhibition may be found in section 813 of the Code with reference to letting the work to the lowest responsible bidder. It is impossible to do more than guess at the legislative intent. With reference to the Code commissioners' report, the holding generally has been that in the absence of clear indications to the contrary no change in the laws were intended, even if there be a change in the language used, for the commission did not understand it to be within its province to change the law as it then existed. See Report of Commission, pages 1 and 3, and cases hitherto cited. Of course the language used in the rewriting of the

laws whether of the Code Commission or of the Legislature in acting upon its report, if clear and unambiguous, must control, for the intent of the lawmaking body is to be found in the language used by it. Either one of two purposes may have been in mind in dropping out the provision with reference to the use of patented articles. This may have been done because the Legislature thought it unwise to permit municipalities to make use thereof in the construction of public improvements. If it had so thought, and that matter was in mind, it would have been easy to have prohibited the use thereof expressly, instead of leaving the matter to intentment in virtue of a subsequent statute with reference to letting the work to the lowest bidder.

On the other hand, in giving to the city council power by section 810 of the Code to select the kind of material to be used and the method of construction, it may have thought that the provision as to patented articles was surplusage, and that section 813 of the Code regarding bids had reference only to those cases where competition was possible in the materials to be used. One theory is just as tenable as the other, and there is nothing to indicate that the Legislature in dropping from the statute the words "patented or otherwise" intended to prohibit the use of patented or monopolized articles in works of public improvement. So that we must determine whether the city had power under section 810 of the Code to select a patented article, and provide the method of construction in passing its resolution for the paving of Iowa avenue. It must be remembered in this connection that a majority of the property owners petitioned for the use of this particular kind of pavement in asking that the avenue be paved, and that the council's act in selecting this particular kind of pavement was regular and free from favoritism, fraud or oppression; moreover, there was as much competition between bidders as it is possible to have where a patented article is used. There is a line of cases which broadly hold that where an article is monopolized,

no matter whether legally or not, as under a patent, and the statute provides that work of public improvement shall be let to the lowest bidder, such monopolized article cannot be used, for the reasons, first, that monopolies are odious in law, and second, because without free competition there is always opportunity for favoritism, fraud, graft and oppression. The leading case on this subject is *Dean v. Charlton*, 23 Wis. 590 (99 Am. Dec. 205). This case has been followed in other States. See *Siegel v. Chicago*, 223 Ill. 428 (79 N. E. 280); *Monaghan v. City* (Ind. App.), 75 N. E. 33 (Id., 76 N. E. 424); *Nicolson v. Painter*, 35 Cal. 699; *State v. Elizabeth*, 35 N. J. Law, 351; *Burgess v. City*, 21 La. Ann. 143; *Fones v. Erb*, 54 Ark. 645 (17 S. W. 7, 13 L. R. A. 354); *Fineran v. Central Co.*, 76 S. W. 415 (116 Ky. 495); *Smith v. Syracuse Co.*, 161 N. Y. 484 (55 N. E. 1077); *Barber Co. v. Gogreve* (Ala.), 5 South. 853; *Diamond v. City*, 89 Minn. 48 (93 N. W. 912, 61 L. R. A. 448).

On the other hand, many courts have held that a statute providing that work shall be let to the lowest bidder does not prejudice the use of patented articles. The leading case on this side of the question is *Hobart v. Detroit*, 17 Mich. 246 (97 Am. Dec. 185), opinion by Cooley, J. This has been followed in *State v. Shawnee Co.*, 57 Kan. 267 (45 Pac. 616); *Holmes v. Council*, 120 Mich. 226 (79 N. W. 200, 45 L. R. A. 121, 77 Am. St. Rep. 587); *In re Dugro*, 50 N. Y. 513; *Rhodes v. Board*, 10 Colo. App. 99 (49 Pac. 430); *Swift v. City*, 180 Mo. 80 (79 S. W. 172); *Mayor v. Flack* (Md.), 64 Atl. 702; *Field v. Barber Asphalt Co.* (C. C.), 117 Fed. 925, (Id. 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142); *Bunker v. City* (Kan.), 87 Pac. 884; *Bye v. Atlantic City* (N. J. Sup.), 64 Atl. 1056; *Mayor v. Bonnell*, 57 N. J. Law, 424 (31 Atl. 408); *Schuck v. City*, 186 Pa. 248 (40 Atl. 310); *City of Raymo*, 68 Md. 569 (13 Atl. 383); *Yarnald v. Lawrence*, 15 Kan. 126, opinion by Brewer, J.; *Hastings v. Columbus*, 42 Ohio St. 585;

Monaghan v. City (Ind. App.), 76 N. E. 425; *Perine v. Quackenbush*, 104 Cal. 684 (38 Pac. 533).

All the cases on either side of this proposition seem to be collected in the valuable notes found in 5 L. R. A. (New Series) 680, and 18 L. R. A. (Old Series) 45. In each of the leading cases above cited there was a strong dissenting opinion, and in view of the decided conflict in the opinions of able courts and judges it is manifest that cogent reasons may be given in support of either conclusion. The Wisconsin court has recently limited the rule announced in *Dean v. Charlton* to the particular point there decided, and held that cities may contract for the building of patented crematory furnaces, where the contract for doing the work was let to the lowest bidder. *Dean v. Charlton* was explained, and the conclusions there reached sustained, because the charge was to be made upon abutting property, the owners of which had the right to construct the improvement in front of their own properties. See *Kilvington v. Superior*, 83 Wis. 222 (53 N. W. 487, 18 L. R. A. 45). In this latter case it is said: "Under any other theory a municipal corporation would be obliged to forego the purchase and use all patented implements, modes, or processes — a result we cannot think the Legislature contemplated." Under our statutes the abutting owner has no power to construct the pavement himself, and for this there is very good reason. It is important that in the making of such public improvements as street paving there shall be some harmony in design, in wearing qualities, and in contour. A particular kind of pavement for a designated district is less expensive than several kinds for the same district. Again, the kind of material to be used and the method of construction is wisely left to the city council, and its conclusion within proper limits is binding in the absence of fraud or oppression. Where the materials are determined upon and the method of construction fixed, the entire work is done under the direction of public officials, and is made a consistent whole.

No abutting owner has power to construct the pavement in front of his lots. He must abide by the decision of the city council so long as its acts within the scope of its authority and is guilty of no fraud or oppression. Other courts holding to the Wisconsin doctrine have been forced to recede from the bold proposition that patented articles cannot be purchased by public boards or officials where contracts must be let to the lowest bidders. See *Perine v. Quackenbush*, 104 Cal. 684 (38 Pac. 533); *Bye v. Atlantic City* (N. J. Sup.), 64 Atl. 1056; *Mayor v. Bonnell*, 57 N. J. Law, 424 (31 Atl. 408). We shall not take the time and space necessary to review the cases which might be cited upon the propositions collaterally and directly involved. It is enough to consider the case as it is presented with reference to its peculiar facts, and to announce a rule which is decisive thereof.

It must be remembered that the monopoly in this case, if one exists, was created by the government. It is not one which is odious in the eye of the law, for it was granted by the public as a stimulus to inventive genius, and to preserve to the individual the fruits of his discovery. That thought may be stimulated for the public good, new and useful inventions are patentable, and the discoverer is given the exclusive right to use his invention for a limited period of time. While there are artificial monopolies which are odious in the eye of the law, it seems clear that one created by the government for the purpose of fostering useful discoveries is not such as courts should discredit. Take this case as an example. The patents for paving substances and materials cannot be used for many other purposes. The field for use is limited, and if cities and towns may not avail themselves of new discoveries in this line, little encouragement will be given to invention, and we must depend upon the cobblestones of our forefathers. Surely the Legislature did not intend this result when it made the provision for competitive bidding. It would have been easy to have prohibited the

use of patented material in the construction of pavements had the Legislature so willed. As it did not do so, such prohibition should not be inferred from the fact that contracts are to be let to the lowest bidder. What is meant by this statute is that there must be competition where competition is possible. This is the construction usually given to statutes which are not prohibitive in character. If the material, or part of it, is monopolized by patents, there cannot, of course, be absolutely free competition, and where that is impossible, it surely was not the intent of the Legislature that all improvements should cease, or that antiquated methods only should be adopted. All that the law means, as we view it, is that in all cases where competition may exist, such competition shall be allowed by receiving bids, and in the absence of express prohibition there is nothing to warrant the exclusion of patented articles. The provision as to bidding regulates the exercise of a power and was manifestly not intended to limit it. And neither the public nor the parties benefited by the improvement should be deprived of the best and most approved pavements because full effect cannot be given to an act passed to regulate the exercise of a power expressly granted by other statutes. In other words, the provision as to competitive bidding has reference only to those cases where there may be competitive bidding and not to cases where some of the articles which enter into the work may be in the hands of particular individuals. Courts have never willingly blocked the wheels of progress. They should, and have at all times sought to, encourage and stimulate endeavor and to foster individual initiative, and while a great conservative force in government they do not consciously stand in the way of either mental or material advancement. The statute providing for letting a work of public improvement to the lowest responsible bidder was enacted to secure competition, to prevent fraud and defeat graft. It was enacted to remove as far as possible all favoritism and to secure the performance of public work at the lowest possible price;

but it was not intended thereby to impose upon individuals the use of an article simply because it was old, nor to thrust upon the people something that was inferior and antiquated simply because there might be competition as to that, but not in a newer and superior article. The statute does not say that no contract shall be let if there be but one bid, nor that a bid shall be rejected because it includes the use of a patented article. This result is claimed by construction. An elementary rule in the construction of statutes is that they shall be given a reasonable and not an arbitrary interpretation. When this is done, but one result, as we think, can be reached. This is an age of improvement and of progress, and courts should do nothing which will deny municipalities the right to use the most modern methods and improvements unless it is clear that the Legislature so intended.

There may be a monopoly, natural or artificial, in many of the substances which enter into a pavement. Thus there may be but one bank of sand which is available, or there may be a labor union which fixes the price of all work, or there may be patented machinery for mixing the cement, and in such cases surely no one would contend that no improvement could be made because, forsooth, no competitive bids may be made. We are well satisfied with the reasoning of Judge Cooley in the *Hobart* case, *supra*, and without quoting from his opinion, we adopt the reasoning thereof as being the true solution of the problem. But it is not true that there may not be competition in a patented article. This case is a demonstration that there may be. Competitive bids were received, which were not the same, but varied as above stated. The Warren Bros. Company agreed to furnish its patented material at a flat price to all bidders. The proposition was filed with the city council, and the price named. Bidders knew just what they would have to pay for the material, just as they might have known what they would have to pay for brick, sand, and cement had the pavement been made of brick. We have already set out the proposi-

tion, and need not repeat it here. Under the great weight of authority the statute was sufficiently complied with, and there was competitive bidding. See *Monaghan v. City*; *Bye v. Atlantic City*, and *Hastings v. City*, *supra*; *Mayor v. Flack* (Md.), 64 Atl. 702; *State v. Board*, 57 Kan. 267 (45 Pac. 616); *Bunker v. City* (Kan.), 87 Pac. 884. Quotations from the opinions in these cases are unnecessary as they are readily accessible and fully cover the point here decided.

The city council adopted the particular pavement after full investigation, and with the best light it could get upon the subject. Its motives are nowhere questioned, nor its purposes challenged. So far as shown, it acted with good business judgment and in full accord with the wishes of a majority of the abutting property owners. There is no claim of fraud and no implication of bad motive, and in our opinion there was all the competition which was necessary to justify the letting of the contract. The testimony shows that while there are other pavements similar to the Warren Bros., none are so good and none so impervious to water and the action of the elements. The trial court found this to be true, and with its conclusion we are agreed. Much more might be said in support of the conclusion of the trial court, but we have said enough to indicate our views, and as this opinion has already grown too long, we forbear any further discussion.

The decree is right, and it is *affirmed*.

STATE OF IOWA v. D. F. CAINE, Appellant.

Conspiracy: INDICTMENT: DUPLICITY. Where the separate counts
1 of an indictment for conspiracy charge but one confederation it is not bad for duplicity, and the State will not be required to elect on which count it will rely prior to the introduction of its evidence, even though different objects or purposes are stated.

Conspiracy: PROOF. The fact of conspiracy need not be proven by
2 direct evidence, but proof of concert of action in carrying out
a criminal purpose will support conviction.

Evidence: ACTS OF CO-CONSPIRATORS. After a *prima facie* case of
3 conspiracy has been made out, the acts of numerous persons
engaged in carrying out the purpose of the conspiracy may be
shown, though not committed in the presence of defendant.

New trial: MISCONDUCT OF JURORS. For jurors to read, during the
4 trial, local newspaper accounts of the evidence and proceedings
in the cause is misconduct authorizing a new trial, although the
jurors testify that they were not influenced in their action
thereby.

Appeal from Woodbury District Court.—HON. GEORGE W.
WAKEFIELD, Judge.

THURSDAY, APRIL 11, 1907.

DEFENDANT and one McGuire were jointly indicted for
conspiracy. On a separate trial defendant was found guilty
and sentenced. From this sentence he appeals.—*Reversed*
and *remanded*.

Wilbur Owen and C. A. Irwin, for appellant.

Chas. W. Mullan, Attorney-General, and U. G. Whitney,
County Attorney, for the State.

McCLAIN, J.—I. The indictment, in two counts, was
as follows:

The grand jury of the county of Woodbury, in the name
and by the authority of the State of Iowa, accuse D. F. Caine
and Charles McGuire of the crime of conspiracy, committed
as follows:

Count I. The said D. F. Caine and Charles McGuire
and divers other persons to the grand jury unknown, on or
about the 1st day of August, 1904, in the county of Wood-
bury and State of Iowa, unlawfully, willfully, and felon-
iously did conspire, agree, and confederate together with the
fraudulent and malicious intent and purpose wrongfully,

feloniously, and unlawfully to injure the person of H. H. Hawman, S. A. Huntley, Ned Brown, John Stausberry, William Eberline, F. E. Haight, John Limebach, George Buckland, and Charles A. Wagner, and divers other persons to the grand jury unknown, by as aforesaid unlawfully assaulting, striking, beating, and wounding the said H. H. Hawman, S. A. Huntley, Ned Brown, John Stausberry, William Eberline, F. E. Haight, John Limebach, George Buckland, and Charles Wagner, and divers other persons to the grand jury unknown.

Count II. And the grand jury of the county of Woodbury, in the name and by the authority of the State of Iowa, with no intent or purpose of charging any offense or crime other than the offense and crime charged in count I above, but solely in order to meet the testimony, further alleges: That the said D. F. Caine and Charles McGuire, together with divers other persons to the grand jury unknown, on or about the 1st day of August, 1904, in the county of Woodbury and State of Iowa, unlawfully, willfully, and feloniously did conspire, confederate, and agree together with the fraudulent and malicious intent and purpose wrongfully to do an act injurious to the public police, and to injure the business, property, and rights of the property of the Cudahy Packing Company, a corporation organized under the laws of the State of Illinois and doing business at Sioux City, Iowa, in the killing of live stock and the packing and preserving of the products thereof, the particular means agreed upon to carry out, execute, and accomplish said conspiracy as aforesaid, by the said D. F. Caine and Charles McGuire, and said divers other persons to the grand jury unknown, being to unlawfully beat, wound, strike, assault, inflict bodily injury and harm upon, and threaten with bodily harm and injury, and to use profane and vulgar and indecent language toward, all persons in the employ of the said Cudahy Packing Company, or who might seek employment of or from the said Cudahy Packing Company, or who might have business engagements with the said Cudahy Packing Company, at their place of business in Sioux City, Iowa, or who might have business engagements in or around the building or property of the said company at Sioux City, and especially to use and employ the particular means above set out toward one C. W. Jackson, who was then and there

sheriff of the said county, and H. H. Hawman and S. A. Huntley, who were then and there deputy sheriffs of said county, all of said officers being then and there engaged in guarding and protecting as peace officers the property and employes of the said Cudahy Packing Company at Sioux City, Iowa, all of said means so agreed upon by said defendants and divers other persons to the grand jury unknown, being with the malicious purpose and intent and design on the part of the said Charles McGuire, D. F. Caine, and divers other persons to the grand jury unknown, wrongfully to harass and annoy said company and to frighten its said employes and prospective employes from entering or remaining in the employ of said company, and thereby prevent said company from successfully carrying on its said business, causing loss of property and damage to the business of said company, and with the malicious intent, purpose, and design to hinder, delay, and prevent said company from hiring or securing employes, and from successfully carrying on their said business.

The court overruled a motion for defendant made after the impaneling of the jury and before the introduction of evidence requiring the State to elect upon which count of the indictment it would proceed, and error is assigned on this ruling. The ground relied on in the motion was that the counts charged different and separate acts, and that it was not made to appear by averment that the acts charged in the first count and those charged in the second count were parts of one and the same offense or transaction, as required by Code, section 5284, which prohibits the charging of more than one offense in the same indictment, but permits one offense to be "charged in different forms to meet the testimony." Each count charges a conspiracy. If the two counts charge different conspiracies, the indictment is bad for duplicity, and defendant was entitled to have the State elect on which of them it would proceed; while if they charge the same conspiracy, in different forms, the motion was properly overruled.

The first count charges an agreement and confederation to injure the persons of certain named individuals by assault-

ing, beating, and wounding them. The second count charges

1. CONSPIRACY:
indictment:
duplicity.

an agreement and confederation to do an act injurious to the public police, and to injure the business and property of a corporation named, by assaulting, beating, wounding, threatening with bodily harm, and using profane and vulgar language toward certain persons named and others described, by classes, as persons employed by, seeking employment from, and having business engagements with said corporation. The two counts are substantially identical in charging the offense alleged in each as that of conspiracy to assault, beat, and wound certain persons. The offenses of conspiracy thus charged may be the same as to the fact of agreement and confederation, for in each count the confederation is charged to have been with McGuire and divers other persons to the grand jury unknown. The identity of such other persons could be established by the same evidence under either count. The offenses may be the same, also, as to the acts contemplated, for under each evidence would be admissible to show a purpose to assault, beat, and wound Hawman, Huntley, and others who are specifically named or described to the grand jurors as unknown in the first count, and named or described as belonging to certain described classes of persons in the other. Proof of assaulting, beating, and wounding Hawman or Huntley would tend to establish the purpose of the conspiracy charged in either count. Further identity as to the persons to be thus injured or as to the nature of the injuries to be inflicted was not necessary, provided the same confederation was pointed out in the two counts, for under either of them proof that the purpose included other injuries to other persons would simply enlarge the scope of the purpose. The ultimate object of the confederacy to injure is different, but that is immaterial, for the primary object of injuring in a specified manner certain persons would make the confederation criminal regardless of what the ultimate object may have been. Under either count the State might therefore have proceeded to

prove a confederation to assault, beat, and wound Hawman and Huntley, and an election between the two counts could not properly have been required. Moreover, various intents are specified in the alternative in Code, section 5059, defining the crime of conspiracy, and all or any two or more of these might be charged conjunctively in one indictment, and there is no objection to charging one or more of such intents in one count, and others in another, if the same act of confederation is referred to in each. Therefore, even though the intent stated in the second count was different from that stated in the first count, it does not necessarily follow that there was duplicity in the indictment requiring an election.

The real controversy before us, then, as counsel on the two sides agree, is as to whether the two counts refer to one and the same confederation, for if but one confederation is alleged, the object to be accomplished and the means to be employed may be any of those specified in the section of the Code, provided, of course, they are sufficiently described to bring them within the statutory definition of the offense. Identity of description in the two counts would not alone relieve the State of the duty to elect, for even under one count the State could not proceed to prove two different objects or purposes, although each might be within the statutory definition. On the other hand, dissimilarity of object or purpose would not necessitate election before the introduction of evidence, for the State would have the right to proceed to prove any one of the objects or purposes charged and could be required to elect only when it appeared that it was seeking to prove two or more distinct acts of confederation. The words relied on by the State, as showing that the confederation charged in the second count is the same as that charged in the first, are the following, at the beginning of second count: "And the grand jury, . . . with no intent or purpose of charging any offense or crime other than the offense and crime charged in Count I, above, but solely in order to meet the testimony, further alleges." We think the plain and evident

purpose in using these words was to advise defendant that the act of conspiracy described in the second count was the same act of conspiracy charged in the first. The only possible ambiguity is in the use of the words "offense or crime." As here used, these words are synonymous. Either may, in general, be used to describe a class of acts defined as a crime of one name or description, as burglary, larceny, or conspiracy, or one act within any such class. But as here used, either word must be understood as referring to a particular act, and not any one of a class of acts constituting a crime of the same name. The offense or crime referred to, as charged in the first count, is not any act constituting the crime of conspiracy in general, but the specific confederation charged in the first count, as constituting a conspiracy. *State v. Kennedy*, 63 Iowa, 197.

It is true that the language of an indictment is to be carefully scrutinized to determine whether it does with sufficient definiteness state the facts constituting the offense charged, i. e., whether it does charge the facts "in such manner as to enable a person of common understanding to know what is intended." Code, sections 5280, 5289. But the language of the indictment "is properly to be construed in the sense in which the party framing the charge must be understood to have used it, if he intended his accusation to be consistent." 1 Bish. New Cr. Proc. section 510, quoting from 1 Chitty, Crim. Law, 231. And see *State v. Grant*, 86 Iowa, 216, 223; *State v. Dow*, 73 Iowa, 587. We reach the conclusion, therefore, that the two counts do not necessarily refer to separate acts of confederation, but may relate to the same act, and that defendant must have understood from the language used that they were intended by the pleader to refer to one and the same act; and the State was not therefore bound to elect before any evidence was introduced, upon which of the two counts it would rely for conviction.

II. The sufficiency of the evidence to establish a conspiracy is questioned by counsel for appellant. The evidence

tended to show that during a strike of the employés of the Cudahy Packing Company, defendant, who

2. CONSPIRACY: proof. was then keeper of a saloon near the company's packing house, acted in conjunction with certain of the strikers in threatening violence to and inflicting injuries upon other employés of the company. Proof of concert of action in carrying out a criminal purpose or plan is circumstantial evidence of a confederation to effect such purpose or join in such plan. *State v. Gadbois*, 89 Iowa, 25; *State v. Stevens*, 67 Iowa, 558; *Kelley v. People*, 55 N. Y. 565 (14 Am. Rep. 342). An actual agreement to enter into a conspiracy need not be proven by direct evidence to warrant conviction for such crime. *State v. Crab*, 121 Mo. 554 (26 S. W. 548). Counsel for appellant rely on what was said by this court in *State v. Weaver*, 57 Iowa, 730; *State v. Walker*, 124 Iowa, 414; *State v. Crofford*, 121 Iowa, 395. But those cases related to the admissibility as against defendant of acts and declarations of another without sufficient evidence to make out a *prima facie* case of conspiracy. Here a *prima facie* case of conspiracy was made out by proof of acts and declarations of defendant himself. The question as to whether there was a conspiracy was therefore properly submitted to the jury, and there is no complaint as to the correctness of the instructions.

III. Many rulings of the court as to the admissibility of evidence tending to show acts of violence not committed in defendant's presence are questioned. But when a *prima facie* case of conspiracy is made out, evidence

3. EVIDENCE: acts of co-conspirators. of acts and declarations of the conspirators, though not in the presence of each other, if in the carrying out of the common purpose, is admissible. *State v. McGee*, 81 Iowa, 17; *State v. Row*, 81 Iowa, 138; *Sand v. Commonwealth*, 21 Grat. 871; *Chapman v. State*, 45 Tex. Cr. R. 479 (76 S. W. 477); 12 Cyc. 436. When large numbers of persons are engaged in carrying out the purpose of a con-

spiracy to which the defendant is a party, the acts of each in carrying out that common purpose may be shown.

IV. In support of a motion for new trial, affidavits of jurors and others were presented showing beyond question that while the trial was in progress, members of the jury, while not in the jury box, read the local newspapers containing long accounts of the trial, and at least to some extent read these accounts, especially the headlines; and it was contended that this was such misconduct as to require the setting aside of the verdict. By Code, section 5383, relating to criminal proceedings, the court is required to admonish the jury, whether allowed to separate or not, "that it is their duty not to permit any person to speak to or communicate with them on any subject connected with the trial . . .; and that they should not converse among themselves on any subject connected with the trial, or form or express an opinion thereon, until the cause is finally submitted to them." The reading of newspaper accounts of and comments upon the trial is thus prohibited by the letter and the spirit of the statute. The accounts were written in a somewhat sensational manner, though not perhaps objectionable as news intended for the general public. They were not confined to verbatim reports of the testimony of the witnesses, but to a large extent consisted of condensed accounts of what was testified to by the witnesses, and statements of the facts involved, some of them not shown by any evidence in the case. However fair these accounts may have been, and for the most part they were unobjectionable as a current report of the proceedings, they were communications with reference to the case which the jurors should not have received. The only discussion of the evidence which the jurors should have an opportunity to consider before they are secluded for deliberation on their verdict are discussions in open court by the attorneys of each party in the presence of those for the other, in which errors of statement may be corrected and improper inferences may

4. NEW TRIAL:
misconduct
of jurors.

be controverted. The jurors should not subject themselves to the danger of misconception and error which must exist if outside persons, without the checks incident to an orderly trial and discussion in court, are allowed to sum up the evidence, emphasize its particular features, and suggest the conclusions to be drawn therefrom. It is scarcely necessary to cite authorities in support of so plain a proposition. New trials have frequently been granted for such misconduct. A few cases are sufficient to show the views of courts in general on the question. *State v. Walton*, 92 Iowa, 455; *Cartwright v. State*, 71 Miss. 82 (14 South. 526); *People v. Leary*, 105 Cal. 486; (39 Pac. 24); *People v. Stokes*, 103 Cal. 193 (37 Pac. 207, 42 Am. St. Rep. 102); *People v. McCoy*, 71 Cal. 395 (12 Pac. 272); *Walker v. State*, 37 Tex. 366; *Carter v. State*, 9 Lea (Tenn.) 440; *State v. Robinson*, 20 W. Va. 713 (43 Am. Rep. 799); *Farrer v. State*, 2 Ohio St. 54; *Mattox v. United States*, 146 U. S. 140 (13 Sup. Ct. 50, 36 L. Ed. 917); *Meyer v. Cadwalader* (C. C.), 49 Fed. 32.

Affidavits of the jurors were introduced on the part of the State to show that they were not influenced in their action by the accounts they read; but it was not sufficient to show by them that they were not consciously influenced. The unconscious influence of such accounts would be far more likely to affect the result than an influence of which they were conscious, and which they might the more readily resist.

The motion for a new trial on the ground of misconduct of the jury should have been sustained, and the judgment must therefore be reversed, and the case remanded for a new trial.— *Reversed and remanded.*

SUSAN M. PARRIOTT, Appellant, v. INCORPORATED CITY OF HAMPTON, S. J. PARKER, Mayor, CITY COUNCIL of said Incorporation, and S. W. FERRIS, H. SKOW, H. H. WHEELER, Committee on Streets and Alleys, and A. L. ROBERTS, Appellee.

134	157
140	579
134	157
144	356

Town plats: DEDICATION OF STREETS: ACCEPTANCE. Before a town
 1 can insist upon its right to streets there must be an acceptance by it of the plat embracing the same, but this may be indicated by improvement, or notice to the proprietor that it will open and improve the same when needed; and the enclosure of streets by an ordinary fence, after dedication, will not estop the town from accepting the same.

Defective acknowledgments: CURATIVE ACT. The curative act of
 2 the 24th general assembly is broad enough to validate the defective acknowledgment of a town plat, in which the notary failed to recite that the grantors were the persons appearing before him and whose names were affixed to the instrument, that they acknowledge the same to be their voluntary act and deed, and from which the notarial seal was omitted, and thus render effective the dedication of a plat recorded prior to the act.

Streets: OPENING OF SAME: INJUNCTION. The owner of a tract of
 3 land embraced within a town plat which has been legally dedicated, although by means of a legislative act curing a defective acknowledgment of the plat, which became effective prior to acceptance of the streets, cannot enjoin the opening of the streets solely on the ground that the acknowledgment was defective.

Appeal from Franklin District Court.—**HON. J. R. WHITAKER, Judge.**

THURSDAY, APRIL 11, 1907.

THIS is an action to enjoin the incorporated town of Hampton, acting through its officers, from opening certain alleged streets south of and including Eleventh street, in

Kennedy's addition to that town. James Kennedy acquired title to the land March 16, 1891, and caused a plat to be filed June 10th of the same year. This plat consisted of blocks 1 to 9, inclusive, of the annexed plat. The streets were indicated therein to be sixty-six feet wide, except Franklin from its intersection with Eleventh street, down which was from thirty-one to twenty-nine and three-fourths feet wide. The lots were sixty-six feet wide by one hundred twenty-three and three-fourths feet long, and the blocks not divided into lots two hundred sixty-four feet square, save block 8, which had one corner cut off by the railroad right of way. Attached to the plat was the usual surveyor's certificate, saying that "a stake is set at each corner of each lot and block except where stones are set as indicated thereon." The only acknowledgment to the plat when filed was the following:

We, James Kennedy and Eliza A. Kennedy, his wife, owners and proprietors of the land on which Kennedy's addition to the town of Hampton is laid out, do hereby certify that we caused said addition to the town of Hampton to be laid out, and that disposition of said land as shown by the plat hereto annexed is with our consent and in accordance with our desire. The streets and alleys in said plat are set apart for the use of the public. Witness our hands this 6th day of June, 1891. Jas. Kennedy. Eliza A. Kennedy.

State of Michigan, Ionia County — ss.: I hereby certify that before me, Geo. E. Nichols, a notary public in and for the county of Ionia and State of Michigan, appeared the above named James Kennedy and Eliza A. Kennedy, his wife, owners and proprietors of the land on which Kennedy's addition to Hampton is laid out, as shown by the plat hereto annexed, who are personally known to me, and acknowledged that they caused said addition to Hampton to be laid out, and that the disposition of said land as shown by said plat is with their free consent and in accordance with their desire. Witness my hand and notarial acknowledgment this 6th day of June, 1891. Geo. E. Nichols, Notary Public in and for Ionia County, Mich.

To this was attached a certificate of the Clerk of the Circuit Court of the above county in due form. The record failed to show that a notarial seal accompanied the notary's certificate. The required certificates of the county treasurer and recorder were attached. The following certificate of acknowledgment, accompanied by a certificate of the clerk as above, was filed and recorded October 2, 1891: "State of Michigan, Ionia County — ss.: On this 24th day of September, A. D. 1891, before me, George E. Nichols, a notary public in and for said county, personally came James Kennedy and Eliza A. Kennedy, his wife, personally to me known to be the identical persons whose names are affixed to the annexed and foregoing plat and dedication to the public of Kennedy's addition to Hampton, Iowa, as grantors, and acknowledged the execution of the same to be their voluntary act and deed. Witness my hand and notarial acknowledgment. George E. Nichols, Notary Public in and for Ionia County, State of Michigan. [Seal.]" This was also accompanied with a certificate of the clerk of court.

Kennedy was still the owner of the land, but on March 18, 1892, conveyed it to A. J. Gray, describing it as "all of Kennedy's addition to Hampton, being all of blocks, 1, 2, 3, 4, 5, 6, 7, 8, and 9, according to the plat of same, being E. one-half N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, Sec. 33 — 92 — 20." In July, 1901, Gray deeded a part of it to A. M. Bailey, describing the same thus: "Commencing at a point 43 and fifty-five one-hundredths rods south and 19 rods east of the southwest corner of block 45, in the town of Hampton, Iowa; thence north 4 rods; thence east to east line of section 33 — 92 — 20; thence south to right of way of Iowa Central Railway; thence northwesterly, along said right of way, to a point where said right of way intersects the west line of the alley between Iowa and Franklin streets, if said alley were prolonged to said right of way; thence north, along said west line of said alley, if produced, to a point due east of begin-

ning; thence west to beginning. Said description includes blocks 6, 7, 8, 9, and outlot one of Kennedy's addition to the town of Hampton, Iowa, and is situated in the E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of said section 33, township 92, range 20, subject to all legal highways."

On July 11, 1905, the widow of Bailey and others conveyed to the plaintiff a tract of land described: "Commencing at a point 43 and fifty-five one-hundredths rods south of S. W. corner of block 45, Hampton, Iowa; thence east 19 rods; thence north 4 rods; thence east to east line section 33 — 92 — 22; thence south to north side of right of way of Iowa Central Railway; then northwesterly along the north line of said right of way to east side Main street; thence north to beginning." The streets north of Eleventh street have been opened and improved by the town in such manner as to indicate an acceptance of the dedication. One Roberts bought block 4 in 1900, in reliance on the streets being dedicated as indicated on the plat, and has erected three houses thereon facing Franklin and Vine streets, in all making six houses on one of these streets and three on the other. Up to the time Bailey acquired part of the property, the fence appears to have extended along Eleventh street a little south of the center, and in replacing or repairing he moved it to the north line of that street. All south of such fence, which includes the streets in controversy, has been inclosed and used solely as a pasture. This suit was begun July 31, 1905, shortly after plaintiff received notice to open the streets, and, on hearing, the petition was dismissed. The plaintiff appeals.— *Affirmed*.

John M. Hemingway, for appellant.

H. C. Liggett, for appellees.

LADD, J.— The plat was filed in 1891, so that but 13 years had elapsed at the time the defendant town indicated

its purpose to accept the remaining streets inclosed with blocks 6, 7, 8, and 9 as a pasture. The intention to do so as soon as these were needed was shown by the opening to the public of the streets north of Eleventh street long before if the plat was legal. *Village of Lee v. Harris*, 206 Ill. 428 (69 N. E. 230, 99 Am. St. Rep. 176). The mere fact of inclosure by an ordinary fence, did not estop the town from accepting the streets when ready to improve them, for such use was not inconsistent with the purpose to dedicate. Until acceptance, the owner was entitled to the beneficial use of the property, and, unless the improvements are inconsistent with the intent to dedicate, the city or town will not be deemed to have abandoned its right to acquire the land set apart for streets whenever it may elect so to do. *Burroughs v. Cherokee*, 134 Iowa, 429. The town plainly indicated its acceptance of the dedication by notice to plaintiff that it would open the streets, and, in attempting to enjoin it from exercising the right to accept by opening and improving such streets, she is in no position to contend they have not been previously accepted. The statute points out the method to be pursued by a proprietor who wishes to vacate a plat, and this may not be accomplished by merely insisting that there has not been a platting of the ground, or that if platted it has not been accepted, or that it has in fact been withdrawn or abandoned. These matters relate to conditions actually effected, and not to the municipality's right to accept at the present or in the future. Of course, there must be an acceptance before the incorporated town may insist upon its right to use the streets. This may be indicated by an incorporated town in any unequivocal manner, such as the improvement of the streets, or by notice to the proprietor that it will open and improve them. See *Burroughs v. City of Cherokee, supra*.

The record clearly establishes the town's right to the streets, if the statute was so followed in platting the ground as that such streets were dedicated to the public use. The

plat substantially complied with the requirements of the statute, and was filed June 10, 1901. See *Coe College v. Cedar Rapids*, 120 Iowa, 541.

2. DEFECTIVE ACKNOWLEDGMENTS: curative act. The acknowledgment thereof was defective, in that the notary public taking it did not certify that Kennedy and his wife were the identical persons then before the notary or those whose names were subscribed, and that they acknowledged the same to be their voluntary act and deed, though possibly something equivalent to this last. Also, the notarial seal was omitted. See *Stephens v. Williams*, 46 Iowa, 540. Sections 560, 1963, Code 1873. But a form of acknowledgment was attached to the instrument by an officer purporting to have authority to take acknowledgments, and it is well settled that ordinarily such defects may be cured by subsequent legislation. Section 1967 of the Code of 1873, as amended by chapter 42, of the Acts of the Twenty-Fourth General Assembly, provided: "That the acknowledgments of all deeds, mortgages, or other instruments in writing, taken and certified previous to the first day of February, 1892, and which have been duly recorded in the proper counties in this State, be and the same are hereby declared to be legal and valid in all the courts of law and equity in this State or elsewhere, anything in the laws of the Territory or State of Iowa in regard to acknowledgments to the contrary notwithstanding." "Duly recorded" as here used means actually recorded. *Brinton v. Seevers*, 12 Iowa, 389. In *Bresser v. Saarman*, 112 Iowa, 720, an acknowledgment of adoption papers before a justice of the peace, unaccompanied by a certificate under official seal of the proper officer certifying to the official character of the justice, his authority to take acknowledgments, and the genuineness of his signature, as required by statute, was held to have been validated by this act. See, also, *Ferguson v. Williams*, 58 Iowa, 717; *Buckleby v. Early*, 72 Iowa, 289; *Collins v. Valleau*, 79 Iowa, 626. The absence of seal has repeatedly been held cured by such a statute

in other jurisdictions. *Williams v. Ass'n*, 79 Wis. 524 (48 N. W. 665); *Kenyon v. Knipe*, 2 Wash. T. 422 (7 Pac. 854); *Tidd v. Rines*, 26 Minn. 201 (2 N. W. 497); *Waters v. Spofford*, 58 Tex. 115; *Mazey v. Wise*, 25 Ind. 1. And, in *Baker v. Woodward*, 12 Or. 3 (6 Pac. 173), the acknowledgment held to have been cured did not certify that the grantor was known to the notary. Others may be found holding the lack of authority to take an acknowledgment or omission to show such authority is remedied by a curative act. *Bryan v. Bryan*, 62 Ark. 79 (34 S. W. 260); *Apel v. Kelsey*, 47 Ark. 413 (2 S. W. 102); *Wallace v. Moody*, 26 Cal. 387; *Logan v. Williams*, 76 Ill. 176. See cases collected in 1 Cyc. 612.

The above statute is broad in its terms, and, while it does not purport to supply an acknowledgment entirely omitted, it does undertake to cure all defects short of so supplying such omission. It is urged, however, that, as the acknowledgment of a plat is made by the statute essential to the conveyance of the title in the streets to the municipality, the curative act has no application. Language to this effect will be found in *Goodykoontz v. Olsen*, 54 Iowa, 174, where the court held the acknowledgment of a tax deed to be a part of its execution by the county treasurer. Under the Revision 1860, section 784, such deed did not constitute a conveyance until the officer had acknowledged it, and the owner might not be divested of his property through tax sale in any other way. But subdivisions of land may be disposed of without platting, and the public be invested with title in the streets by dedication otherwise than platting. See section 568, Code 1873. The platting and recording is largely a matter of convenience in the matter of transfers, taxation, and the like (*Brown v. Tabor*, 103 Iowa, 1), and even though section 561, Code 1873, does declare that "The acknowledgment of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use," the title to such

streets does not pass until acceptance by the municipality. *Burroughs v. City of Cherokee, supra*. Acknowledgment of the plat was essential to its validity. *Gould v. Howe*, 131 Ill. 490 (23 N. E. 602); *Armstrong v. Topeka*, 36 Kan. 432 (13 Pac. 843).

But when acknowledgment is effectual through a curative act prior to the acceptance of the streets, and there are no intervening equities, the title to the ground so set apart will thereupon vest in the town or city. Such was the conclusion of this court in *Bresser v.*

3. STREETS: opening of same: injunction.

Saarman, supra, for adoptive papers do not become effective until acknowledged and filed for record. In this case the curative act went into effect in 1892, shortly after Kennedy had conveyed the platted ground to Gray. That conveyance distinctly recognized the plat by describing the several blocks therein, and Gray conveyed in the same way to Bailey in 1901. These parties, then, were not only advised of the existence of the plat, but recognized and adopted it in transferring the property. In these circumstances, it is manifest that the plat became effective upon the adoption of the curative act, for, though up to that time the attempt to plat had not been effective, the act healed the defect in the acknowledgment and the plat was then acknowledged and recorded as required by law. The plat as thus made harmonized with the conveyance previously made to Gray and subsequently by him to Bailey and others.

True the land was also otherwise described in these deeds, but this does not militate against the inferences to be drawn from their recitals. The plaintiff traces her title through these deeds, but not necessarily through the description by blocks, save possibly that of Gray. See *Quinnin v. Reimers*, 46 Mich. 605 (10 N. W. 35), and *Johnstone v. Scott*, 11 Mich. 232, holding that, if both parties claim through a plat, its validity becomes immaterial. The plat was an instrument in writing, within the meaning of the curative act (*Williams v. Milwaukee, etc., Ass'n*, 79

Wis. 524 (48 N. W. 665), and, in the circumstances disclosed, we are inclined to uphold the validity of the plat.

The decree dismissing the plaintiff's petition is *affirmed*.

IN THE MATTER OF THE ESTATE OF BATES M. MANNING,
Minor Heir of EDWIN MANNING, Deceased.

Guardian and ward: CONTRACT OF GUARDIAN TO PAY ATTORNEY'S FEES.

- 1 To give validity to the contract of the guardian of a minor to pay attorney's fees for matters pertaining to the minor's estate, the order of court authorizing the same must be made a matter of record.

Same. The guardian of a minor heir is entitled, on the final report
2 of the trustee of the minor's estate, to contest the validity of a contract with the trustee providing for payment of attorney's fees to the trustee.

Minors: LOANS TO TRUSTEE: LIABILITY OF ESTATE. The estate of a
3 minor is liable for money borrowed by a trustee, whether ordered by the court or not, where the funds were actually used for the benefit of the estate; and it is immaterial that the trustee had funds of the estate in his hands at the time.

Appeal from Van Buren District Court.—HON. C. W. VERMILLION, Judge.

THURSDAY, APRIL 11, 1907.

ON the 6th day of February, 1902, H. B. Sloan was appointed by the district court of Van Buren county trustee of the estate of Bates M. Manning, a minor, and qualified as such trustee. The principal contest in this case arises on objections filed by the guardian and guardian *ad litem* of Bates M. Manning to the reports of the trustee. The trustee had borrowed money of the First National Bank of Farmington, Iowa, executing therefor his notes as such trustee, and said bank appeared in this proceeding and asked that the notes so held by it be established as a claim against

the estate. It afterwards moved a transfer of the issues raised by its pleadings to the equity docket for trial. This motion was sustained, and the issue raised by the bank and the issue raised by the objections to the trustee's reports were heard on the same evidence, although the latter were tried in probate. There was a judgment allowing the bank a part of the amount claimed by it, and approving in part the trustee's reports. The trustee appeals, and in this opinion will be designated as the appellant. The objectors also appealed and have filed an argument. The United States Fidelity & Guaranty Company appeared in the proceeding also and joined issue partly with the trustee and partly with the estate against the claims of the bank. It also appealed; but, as no brief has been filed in its behalf, we shall give it no further consideration.—*Affirmed.*

J. C. Mitchell and *F. M. Hunter* for appellant *H. B. Sloan*.

W. M. Walker, for appellants, the guardian and guardian *ad litem*.

J. C. Mitchell and *F. M. Hunter*, for appellee, First National Bank of Farmington.

SHERWIN, J.—The appointment of *H. B. Sloan* trustee of the estate of *Bates M. Manning* was on the application of the mother of said *Bates M. Manning*, and the appointment gave him full power and authority to take possession of the real and personal property and to do all things necessary for the proper management of the estate and for the full performance of said trust. Prior to his appointment as trustee, *Mrs. Maud M. Manning*, the mother of *Bates M. Manning*, was appointed the guardian of *Bates M. Manning*, and, before *Mr. Sloan* was appointed trustee of the minor's estate, she entered into a contract with *Mr.*

Sloan, wherein it was agreed that Mr. Sloan was to receive as attorney in said estate "in lieu of all services rendered or to be rendered in all matter pertaining to said estate the sum of \$3,000." After his appointment as trustee, another contract was made between Mrs. Manning and Mr. Sloan, in which it was agreed that the law firm of which Mr. Sloan was at that time a member should receive, for services in the estate of the minor, Bates M. Manning, the sum of \$2,000, "in full of all services in any and all matters." The first of these two contracts bore the following indorsement: "The above and foregoing contract approved this 20th day of December 1901. T. M. Fee, Judge." And the second contract was indorsed as follows: "The within stipulation and agreement is hereby approved this January 24, 1903. M. A. Roberts, Judge." On the 27th day of February, 1903, Judge Roberts in chambers approved a report presented by the trustee, in which the trustee credited himself for the full amount of the above contracts. In the same report the compensation of the trustee was fixed at \$1,200 for the first year, and he was also therein authorized to borrow money to make payment of expenses, taxes, etc. This report was acted upon without notice to the guardian of the minor, and the report and the order approving it were not filed in the Van Buren district court until August 3, 1904, and immediately thereafter objections thereto were filed by Mrs. Manning, as the guardian of Bates M. Manning. A subsequent report was also filed by the trustee to which objections were made. In addition to his claim of \$5,000 on the two contracts, the trustee also claimed in his reports the sum of \$500 attorney's fee for procuring the appointment of a temporary guardian of Edwin Manning, grandfather of the ward, and \$1,200 per year as compensation for his services as trustee and some other items of expenses which it is not necessary to mention at this time. In their objections to these reports the guardian and minor alleged that the attorney's fee contracts were

void, because the guardian had no authority to make them, and because the orders of the judges purporting to approve them were void and made without jurisdiction; that the order approving the first report and fixing the compensation of the trustee was subject to the same objections; and further, that the estate was not liable for attorney's fees for procuring the appointment of a guardian for Edwin Manning. The trial court refused to allow the amount claimed under the two attorney's fee contracts, refused to allow anything for procuring the appointment of a guardian for Edwin Manning, and refused to allow the trustee anything for his services and expenses as trustee for the years from February, 1903, to February, 1905. The court did allow \$1,200 compensation for his first year services as trustee, and \$980 attorney's fees actually paid to other attorneys, and \$1,000 for his own services as an attorney.

On the appellant's part, it is contended that the two attorney's fee contracts should have been allowed; that the first contract was entered into between the guardian and Mr. Sloan, and approved by a judge of the court before Mr. Sloan's appointment as trustee, and cannot be attacked collaterally in a proceeding wherein Mr. Sloan is only accounting for his conduct as trustee; and that the same rule applies to the second contract, except that it is conceded that it was entered into after Mr. Sloan had been appointed trustee, and had entered upon his duties as such. It is further contended that Mr. Sloan was entitled to have a jury trial, or a trial in equity wherein he could have appealed *de novo*, as to the reasonableness and validity of the two contracts in question. The further point is made that, Mr. Sloan being a trustee, the court of probate had no authority to call on him for an accounting. While Mr. Sloan was named trustee of the property of Mrs. Manning's ward, he was appointed by the probate court of Van Buren county, and it must be borne in mind that he was claiming under these contracts in a report made to that court, that it is evi-

dent from the entire proceeding that his appointment as trustee was made for the purpose of obviating the appointment of another guardian for the minor; and that it was the evident intention that he should perform the duties of a guardian. As we have heretofore shown, his appointment required him to report to the court making the appointment, and, when he made his reports, he credited himself for expenses and payments or for disbursement of the funds coming into his hands by virtue of such appointment.

One of two things must be true: Either the reasonableness and the justness of the claims made under these two contracts was triable in this probate proceeding, or

1. GUARDIAN AND
WARD: con-
tract of guard-
ian to pay
attorney's fees. they were not proper charges in his favor as trustee. They could only be included in his reports as proper charges against the estate on the theory that he was acting as a guardian or performing the duties of a guardian, and liable as such for his conduct. We think the trial court correctly found the attorney's fee contracts invalid. While section 3200 of the Code authorizes guardians of the property of minors to employ counsel for their wards under proper orders of the court or judge thereof, such orders must be entered on the record of the court to make them effective (Code, section 3784); and, where orders are made out of court, Code, section 3846, requires that they shall "forthwith be filed and entered by the clerk in the journal of the court in the same manner as orders made in the term." While these requirements of the statute do not specifically relate to guardianship proceedings, nor to the powers of a probate court, they are to be applied thereto as effectively as to any other legal proceedings requiring such judgments or orders, and, if this be true, the approval indorsed on the contracts should have been made of record in the district court of Van Buren county to make them valid. *Gillespie v. Sec.* 72 Iowa, 345; *Bristol Savings Bank v. Judd*, 116 Iowa, 26;

Callanan v. Votruba, 104 Iowa, 672; *King v. Dickson*, 114 Iowa, 160.

It follows, from what has already been said, that there had been no adjudication binding the guardian of the minor so far as these two contracts are concerned, and that their contest was timely, and they were entitled to contest the validity of the contracts in this proceeding. Code, section 3399; *Latham v. Myers*, 57 Iowa, 519; *In re Estate of Sawyer*, 124 Iowa, 485; *Dorris v. Miller*, 105 Iowa, 564; *Valley National Bank v. Crosby*, 108 Iowa, 651.

We are satisfied that the evidence fully justified the trial court in disallowing the trustee the attorney's fee claim for services in procuring a temporary guardian for Edwin Manning. The evidence justifies the finding that the trustee acted on his own initiative in such proceeding, and that it was of no substantial benefit to the estate that he represented.

The appellant trustee also complains because he was not allowed \$2,400 for his services and expenses during the years 1903 and 1904. An examination of the entire record satisfies us, however, that the trial court allowed him fair compensation for the actual service rendered by him, and that he has no just cause of complaint on this score. He was given \$1,200 for his services for the first year of his trusteeship, and, from the finding of the trial court, it appears that he was not charged interest on the ward's funds which he held uninvested during his trusteeship. The guardians complain because of the allowance of \$1,200 for the first year, but we are not disposed to interfere therewith. The findings of the trial court on all fact issues in the case are entitled to the same consideration that the verdict of a jury would be, and we find no sufficient reason for interfering therewith.

Some complaint is made by the appellees because of minor allowances made to the trustee by the trial court;

but what we have just said relative to the question of compensation applies to these items: That they all involve questions of fact only, and we are satisfied with the finding of the trial court thereon.

We next consider the controversy between the First National Bank of Farmington and the appellees, the guardian and guardian *ad litem*. The record shows that the trustee had borrowed of the bank a sum in excess of \$4,000, the exact amount of which is not material to our present inquiry. This amount was borrowed at different times, and notes executed to the bank therefor signed by Mr. Sloan as trustee. The bank claimed on these notes the full amount represented by the face thereof, with interest thereon. The trial court held that the trustee had no authority from the court, nor as a matter of law, for borrowing the money represented by these notes, or for giving the notes, and refused to allow the bank the amount of said notes, but the court did find, and the evidence fully sustains the finding, that a part of the money so borrowed from the bank by the trustee was used for the exclusive benefit of the estate, and for such sum, aggregating somewhere near \$2,600. interest and all, it established the bank's claim against the estate. This holding was in accord with previous decisions of this court. Commencing with the first loan of \$1,200. which the trustee claims was authorized by an order of the judge, the record conclusively shows that the sum of \$2,407. which is in part represented by the notes was used for the benefit of the estate, and while there is testimony tending to show that, during a part of the time covered by these transactions, the trustee should have had on hand funds belonging to the estate, under previous decisions of this court the estate is liable for the amount actually received by it. *Deery v. Hamilton*, 41 Iowa, 16; *Iowa L. & T. Co. v. Holderbaum*, 86 Iowa, 1; *Dunne v. Deery*, 40 Iowa, 251; *Simpson v. Snyder*, 54 Iowa, 557; *Valley National Bank v. Crosby*, *supra*.

3. **MIXED: loans
to trustee:
liability of
estate.**

The appellees say, however, that the rule of these cases should not be applied here, because of the fact that it was probably unnecessary to borrow at least a part of this money, because the trustee either had, or should at the time have had, in his hands sufficient funds of the estate to meet the obligations for which the loans were made. If the money received from the bank was in fact used for the benefit of the estate, any mismanagement of the estate's affairs could not defeat the bank's right to recover, unless it was a party to such mismanagement. *Urban v. Hopkins*, 17 Iowa, 105; *Deery v. Hamilton*, *supra*; *Iowa L. & T. Co. v. Holderbaum*, *supra*. This holding is not in conflict with the rule laid down in *Valley National Bank v. Crosby*, *supra*, for in that case it was found that no part of the borrowed money had been used for the benefit of the estate. True, the opinion says that there was no necessity for making the loan, but that was not the point upon which the case turned.

The case is in all respects *affirmed*.

MRS. WILLIAM BISTLINE, Appellant, v. NEY BROTHERS AND
OTHERS, Appellees.

Intoxicating liquors: WRONGFUL SALE: DAMAGES: DEFENSES. Un-

- 1 der the statute all sales of intoxicating liquor to a person in the habit of becoming intoxicated, or using intoxicants as a beverage, are made at the peril of the seller; and on the prosecution of any cause of action growing out of the wrongful act, the good faith of the seller, or his ignorance of the habits of the buyer, is immaterial.

Same: PROOF REQUIRED OF PLAINTIFF: INSTRUCTIONS. In an action

- 2 for damages by the wife for the wrongful sale of intoxicating liquor to her husband, who committed suicide while intoxicated, it is only necessary to satisfy the statute for her to show that the act was committed while he was in fact intoxicated with liquor sold him by defendant; she cannot be required to assume the burden of showing that he would not have committed the act had defendant not sold him the liquor.

Appeal from Clay District Court.—HON. W. B. QUARTON,
Judge.

THURSDAY, APRIL 11, 1907.

ACTION to recover damages on account of alleged unlawful sales of intoxicating liquors to plaintiff's husband. There was a judgment for the defendants, and the plaintiff appeals.—*Reversed.*

G. H. Martin and *F. H. Helsell*, for appellant.

Healy Bros. & Kelleher, for appellees.

WEAVER, C. J.—The defendants, Ney Bros., were registered pharmacists, doing business at the town of Webb, Iowa, during the year 1904, and held a permit for the lawful sale of intoxicating liquors. During the year named, William Bistline, a young married man of twenty-seven years of age, resided with his wife upon a farm about three miles from Webb. The evidence shows quite clearly that Bistline was in the habit of drinking intoxicating liquors to excess and frequently became intoxicated, with the usual result of more or less domestic unhappiness. On the evening of October 29, 1904, Bistline, accompanied by one McClay, his hired man, visited the town of Webb. He returned home that night about half past ten o'clock considerably intoxicated. His wife with her young child were in bed. She gave expression to some words of complaint or remonstrance to her husband. He manifested considerable excitement, and, as was his wont when in a maudlin condition, shed tears. Leaving his wife he went upstairs to McClay's room, where he procured a revolver, but McClay followed and took the weapon from him. He was afterwards heard to go out of the door, and was not seen again, till morning revealed his dead body at the barn some three hundred feet distant from the house. The appearances in-

licated with considerable degree of certainty that as he went out through the kitchen he took a small rifle which he had left there, and with it had shot himself through the head, causing instant death. The petition alleges that on frequent occasions during the said year of 1904 and prior to his suicide, defendants had unlawfully sold to said Bistline intoxicating liquors, thereby contributing to and causing his frequent intoxication, and that on his visit to Webb on the evening of his death, defendants again unlawfully sold him such liquors, thereby causing his intoxication, and that while so intoxicated, and because thereof, he took his own life. For the injury thus caused to her means of support plaintiff asks to recover damages. Defendants admit they are registered pharmacists holding permit for the lawful sale of intoxicants, but deny having made any unlawful sales to Bistline, and deny having caused or contributed to his intoxication. Numerous errors are assigned as grounds for the reversal of the judgment below, but we shall confine our review to those which seems to us decisive of the appeal.

I. Much testimony was offered and admitted on behalf of the defendant, to the point that defendants had no knowledge of Bistline's habits of intoxication, and that such sales

1. INTOXICATING LIQUORS: wrongful sale: damages: defenses. of liquor as were made to him were made in good faith. It seems hardly necessary to say that under our statute every sale of intoxicating liquors to a person in the habit of becoming intoxicated or in the habit of using intoxicants as a beverage is made at at the peril of the seller; and that in any prosecution therefor or of any cause of action based on such wrongful act, the good faith of the seller and his ignorance of the habits of the buyer constitute no answer or defense. He must "personally know" that the buyer is not addicted to such habit, or have written proof of such fact from some reputable third person. Code, section 2394. If he does not know he can refuse to sell, and if he sells without such knowledge, it is an election on his part to take the chances.

The court seems to have given the proper instructions to the jury upon this point; but the testimony was not withdrawn from consideration nor its effect limited in application to any particular proposition on which it might possibly have been admissible.

II. Counsel for the plaintiff requested instructions to the jury, to the effect that it was not essential to her right of recovery that she prove the suicide of her husband was the natural or necessary consequence of his intoxication, but it was sufficient if the act was done by him while he was in fact intoxicated with liquor unlawfully sold him by the defendants. This request was refused, and at the request of the defendant, the court told the jury that before plaintiff could recover damages for injury to her means of support by the death of her husband, she must establish by a preponderance of the evidence that his intoxication was caused by liquors unlawfully sold him by the defendants, and that such intoxication "actually caused his death"; also that "if the evidence leaves it uncertain whether the state of mind of William Bistline which led to the purpose on his part to destroy his life resulted because of his intoxication" or from some other cause, plaintiff could not recover; also, that it was "indispensable" to such recovery that the jury should first find it to be "actually shown that the death of said Bistline was in fact caused or contributed to by his intoxication"; and that it must "not only appear that said Bistline did commit suicide; but that such suicide was caused by the intoxication."

Following these propositions, the court gave the following instructions which we quote in full:

(26) It does not follow that merely because a person injures himself, or is injured while in the state of intoxication, that such intoxication is the cause of such injury, or that any person causing or contributing to such intoxication is liable for the injury.

(27) In order that the defendants, or any of them, may be held liable for any damages resulting to the plaintiff because of the death of William Bistline, it must be shown that the death was caused in a manner, and by means, which naturally resulted because of his intoxication so caused. The motives which lead a human being to acts of violence against himself or others, in order that liability should be created against one who furnishes to such person intoxicating liquors, must be of such character as to be naturally aroused, produced, or set in motion by means, and because of intoxication resulting from the use of such liquors. The mere fact, if it be a fact, that one who has used intoxicating liquors is guilty of acts of violence towards himself or others is not itself sufficient to show that such acts of violence were influenced or caused by the use of such intoxicating liquors. As to whether it was so caused or not it is for you to say from the evidence.

(30) It is not enough in order that you may find a verdict against the defendants or either of them that you find that they made sales of intoxicating liquors or furnished intoxicating liquors to the said Wm. Bistline, and that such sales produced intoxication; in any event, the plaintiff cannot be entitled to a verdict, unless you can find that it is proven by a preponderance of the evidence that if said sales had not been made or such intoxicating liquors furnished by the defendants, or some of them, that the death of said Wm. Bistline would not have resulted.

In our opinion, the instructions here quoted and the others of similar character to which we have made reference, do not correctly state the law. The statute under which this action is brought (Code, section 2418) provides that "every wife, child, parent, guardian, employer, or other person who shall be injured in person or property or means of support *by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person*" shall have a right of action for the damages so sustained against any one who, by selling liquors in violation of law, causes the intoxication of such person. The instruction given the jury, and the argument for appellee, seem to go upon the theory

that the statute bears no different construction than it would have if the words "by any intoxicated person" were eliminated therefrom, and that no right of action exists against the liquor seller for injuries inflicted by an intoxicated person whose condition has been produced by liquors unlawfully sold to him, unless it also be affirmatively shown that such injury is the immediate and proximate consequence of such intoxication. Indeed, they go much farther than this, and require the plaintiff to show, not only the fact of intoxication wrongfully produced by the acts of the defendant in selling liquor to her husband, and his suicide while in such intoxicated condition, but deny her the right of recovery until she has shown by a preponderance of the evidence he would not have taken his own life had not the defendants sold him the liquor which produced the intoxication. Moreover, this burden upon the plaintiff is increased — if that be possible — by requiring her to convince the jury that the death of the suicide was "caused in a manner, and by means which naturally resulted because of his intoxication so caused"; and that the "motives" which led him to turn his hand against his own life were "of such character as to be naturally aroused, produced or set in motion by means, and because of intoxication resulting from the use of such liquors." It requires but little reflection to see that the rule of these instructions casts upon the plaintiff the burden of accomplishing a moral impossibility as an indispensable condition of a right on her part to recover damages, and leaves the statute which attempts to create that right shorn of effective force and vitality.

It is to be remembered that this statute creates a new right of action, and, to sustain such action, the person injured is not required to establish all the elements of an injury actionable at common law. It is enough if the facts alleged and proven include all the elements which the statute upon reasonable and fair construction may be said to pre-

scribe. *Volens v. Owens*, 74 N. Y. 526 (30 Am. Rep. 337); *Dunlavey v. Watson*, 38 Iowa, 398; *Rafferty v. Buckman*, 46 Iowa, 201; *Bertholf v. O'Reilly*, 74 N. Y. 509 (30 Am. Rep. 323). The last-cited case considers a statute which makes the owner of a saloon building liable for damages occasioned by the act of his tenant in selling liquors to one who becomes intoxicated thereon to the injury of his family in their means of support. The right of recovery there upheld presents scarcely a single feature of an actionable wrong at common law. The leasing of his building to a liquor seller was a lawful act; he did not authorize or have knowledge of the sale by the tenant; the resulting injury to the family of the purchaser was not the proximate or immediate result of the lease, and yet the lessor's liability was enforced simply because this liability, remote and indirect though it be, had been by the statute attached to every person who leased his property for use as a place for the sale, whether lawful or unlawful, of intoxicating liquors. So also in the case at bar. Our Legislature has seen fit to prohibit the sale of intoxicants except to certain persons, and for certain specified purposes, and to burden the lawful traffic with certain restrictions and liabilities. No person is compelled to engage in the traffic either lawfully or unlawfully, and, if he does so, he is held to have assumed all the responsibilities which the law has attached thereto. Among these is the statute which specifically declares that any wife, child, parent, guardian, or other person who shall be injured in his or her means of support by any intoxicated person, or in consequence of the intoxication of any person, shall have a right of action for damages against the dealer who wrongfully supplied the liquor which produces or contributes to produce such intoxication. The language is too plain to require interpretation. The liability thus created is to every person who is injured in person or in property or in means of support "by any intoxicated person or in consequence of the intoxication of any person." In other

words, if the injury is inflicted by one who is intoxicated, the statute charges a liability for damages upon him who wrongfully supplied such person with liquor producing the intoxication. If a plaintiff, in an action of this kind, is to be held to establish immediate and proximate relation between the defendant's wrong and her injury, the statute has created no new right, for it is a general rule, as old as the common law, that every person is liable in damages for injuries directly and proximately resulting to another from his tort. The very purpose of the statute is to extend such liability to include injuries which, under the common law, would be held too remote. It is a matter of common observation that the average man when in his sober senses is not violent; is capable of exercising reason and judgment, and is mindful of his duty to his family, and to his neighbors. On the other hand, it is equally well known that intoxicants tend to dethrone the reason; to cast off self-restraint; to inflame the passions; to induce deeds of violence; and is not infrequently the moving cause which ends in murder or suicide. So true is this that when we see or hear or read of such an exhibition of human frailty, and are told that the person guilty thereof was drunk, we readily accept the statement as an all-sufficient explanation. Doubtless it was with this truth in mind that the Legislature enacted the statute which assumes that an injury done by a person while his reason, judgment, and discretion are dethroned by drink is chargeable to his abnormal condition, and that liability for such injury may extend back and affect him who furnished the liquor which produced that condition.

Some of the difficulty which counsel for appellees profess to find with the application of the statute of the present case will disappear when we note that the liability which is here created is not for injuries resulting from the wrongful sale of liquors, but for injuries done by the intoxicated person to others, or resulting to others in consequence of such

intoxication. At common law, as we have already said, there was no such causal connection between the wrongful sale and subsequent act of the purchaser in drinking the liquor to intoxication, and thereby bringing consequential injury to his wife as would support an action by the latter; but the objection for remoteness has been removed by legislative enactment. *McClay v. Worrall*, 18 Neb. 44 (24 N. W. 433). This is not to say that a liquor seller may be held liable for injuries which are in no manner connected with the intoxication of the person in question. If, for instance, as counsel suggest, an intoxicated person is killed by a stroke of lightning or is shot by a highwayman or burglar, or meets with other misfortune having no reasonable or logical relation to his drunkenness no one would think of asserting a cause of action in favor of his dependents against the seller. Indeed the language of this statute clearly excludes all such absurd results. The liability is for injuries to others done *by* the intoxicated person, or resulting *from* his intoxication, and not for anything else. Statutes substantially like our own have been enacted in many other jurisdictions, and while there is some disharmony in the decisions, the great weight of authority is opposed to the theory on which this case was submitted in the court below, and argued here on behalf of the appellees. In Nebraska, under a statute which made the seller liable for all damages that any person might sustain "in consequence of such traffic," the court, answering the same contention which is here advanced by the appellees, says: "Such damages may be indirect and remote so long as they be traced to the traffic as the inspiring, aggravating, or assisting cause. It is not necessary that the damages be such a one as might be foreseen or anticipated by a reasonable person as a consequence of such traffic, or that it should naturally flow therefrom." This holding was reaffirmed in *Sellers v. Foster*, 27 Neb. 118 (42 N. W. 907).

In New York it has been held that where a husband

while intoxicated commits a crime for which he is imprisoned, the wife may recover damages from the liquor seller for her loss of support. The court there says the statute "itself establishes a rule of evidence applicable to and controlling all cases arising under its provisions, which in some respects is new, and has produced radical changes in the common-law rule. The statute makes no distinction whether the loss of the means of support is the direct or remote result of the intoxication." *Beers v. Walkizer*, 43 Hun (N. Y.) 254. To the same effect the Court of Appeals of that State has said the Legislature "may change the rule of common law, which looks only to the proximate cause of the mischief in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it." *Bertholf v. O'Reilly*, 74 N. Y. 509 (30 Am. Rep. 323). The case of *Brockway v. Patterson*, 72 Mich. 122 (40 N. W. 192, 1 L. R. A. 708) is quite in point. The statute there construed differs in no essential respect from our own, and the court held it applicable to the following state of facts. Plaintiff's husband, Brockway, and another person became intoxicated upon beer purchased of the defendant, and on their way home quarreled and engaged in a fight in which Brockway received a blow, resulting in his death. His wife brought an action against the seller for damages, on the ground that she had been injured in her means of support "by an intoxicated person" within the meaning of the law. It was urged by counsel, as it is now urged by appellees in the present case, that the act of the defendant in selling the beer was not one which would ordinarily or naturally result in such a tragedy, and that the death of Brockway was not the direct, natural, or proximate result of the sale of the liquor. The court, overruling this objection, says: "The statute provides, as plain as the English language can state it, that this action shall lie for any injury occasioned by any intoxicated person. It is not for the injured party to pro-

duce proof or for the jury to speculate upon the probabilities whether intoxication was the natural cause of the act which caused the death." If loss of a husband's support by a fatal blow delivered by another in a drunken condition is an injury "by an intoxicated person" within the meaning of the law, surely such an injury by the self-inflicted blow of an intoxicated person will not be regarded an exception to the rule. In *Neu v. McKechnie*, 95 N. Y. 632 (47 Am. Rep. 89), the father of the infant plaintiff became intoxicated, and in this condition killed his wife, and followed the murder by suicide. Under a statute in the precise language of our own, an action was brought by the infant against the liquor seller. Here also objection was raised because of lack of proximate and causal relation between the sale of the liquor by the defendant and the murder and suicide committed by the purchaser, but the court says it was sufficient for the plaintiff to show "the sale of the liquors producing the intoxication, and the act of the intoxicated person causing the injury to the plaintiff." The opinion further says: "The jury were not to inquire whether either the homicide or the suicide were the natural, reasonable, or probable consequences of the defendant's act. It is enough if, while intoxicated in whole or in part by liquors sold by the defendant, those acts were committed, if by reason of them, or either of them, the plaintiff's means of support were affected to his injury."

While cases may be found in which the ordinary rule of proximate cause is spoken of as applicable to claims for recovery of damages for injury done by an intoxicated person, there is scarcely one in which a recovery has been sustained that such rule is not ignored or treated as superseded by the statute. For instance, where the owner of a building let his property for saloon purposes, and the tenant sold liquor to a third person who became intoxicated thereon, and in such a condition abused and caused the death of a horse

owned by a fourth person, the latter was permitted to recover damages from the landlord. *Bertholf v. O'Reilly*, 74 N. Y. 509 (30 Am. Rep. 323). See, also, *Dunlap v. Wagner*, 85 Ind. 529 (44 Am. Rep. 42). Again, where the intoxicated person undertook to drive home and fell in such manner as to be beaten to death by the wheel of his own wagon, the wife was held entitled to recover. *Mead v. Stratton*, 87 N. Y. 493 (41 Am. Rep. 386). The seller has been held liable for damages suffered by reason of an assault committed by the intoxicated person. *English v. Beard*, 51 Ind. 489; *Mastad v. Swedish Brethren*, 83 Minn. 40 (85 N. W. 913, 53 L. R. A. 803, 85 Am. St. Rep. 446); *Pickard v. Tearo*, 34 Ill. App. 398; *Doty v. Postal*, 87 Mich. 143 (49 N. W. 534); *McClay v. Worrall*, 18 Neb. 44 (24 N. W. 429). Injury to the wife's means of support by the suicide of the husband while intoxicated affords a right of action. *Lawson v. Eggleston*, 52 N. Y. Supp. 181 (28 App. Div. 52, affirmed in 164 N. Y. 600, 59 N. E. 1124); *Blatz v. Rohrbach*, 42 Hun (N. Y.) 402. This case was reversed upon appeal, but not upon the point here referred to. In Indiana, it is held that a wife may recover damages for injury to her means of support occasioned by the imprisonment of her husband for a crime committed while intoxicated upon liquors sold him by the defendant. *Homire v. Halfman*, 156 Ind. 470 (60 N. E. 154). She may recover for an assault upon herself by her husband while intoxicated. *Wilson v. Booth*, 57 Mich. 249 (23 N. W. 799); *Schlosser v. State*, 55 Ind. 82. So also where the injury is occasioned by the reckless driving of a horse by an intoxicated person. *Aldrich v. Sager*, 9 Hun (N. Y.) 538; *Hackett v. Smelsey*, 77 Ill. 109; *Mulcahey v. Givens*, 17 N. E. 598 (115 Ind. 286). For other illustrative cases, see *Boos v. Sliney*, 11 Ind. App. 257 (39 N. E. 197); *Stafford v. Levinger*, 16 S. D. 118 (91 N. W. 462, 102 Am. St. Rep. 686); *King v. Haley*, 86 Ill. 106 (29 Am. Rep. 14); *Peterson v. Knoble*, 35 Wis. 80; *People v. Brumback*, 24

Ill. App. 501; *Smith v. People*, 141 Ill. 447 (31 N. E. 425); *Curran v. Percival*, 21 Neb. 434 (32 N. W. 213); *McCarty v. Wells*, 51 Hun (N. Y.) 171 (4 N. Y. Supp. 672); *Bacon v. Jacobs*, 63 Hun, 51 (17 N. Y. Supp. 323); *Bodge v. Hughes*, 53 N. H. 614; *Fortier v. Moore*, 67 N. H. 460 (36 Atl. 369); *Weick v. Lander*, 75 Ill. 93. Not all of these authorities state the rule as broadly as do the cases from Michigan and New York; but the logical tendency of all is in the same direction. As already noted, there are among them opinions which profess to apply the rule of proximate cause; but in each instance the term "proximate," is used in the sense of an originating cause, from which the injurious effect is logically traced through an intervening series of acts or events. This rule is, of course, properly applicable where the right of recovery is based upon the second clause of the civil damage statute which makes the liquor dealer liable for injury sustained "in consequence" of the intoxication of any person. But where recovery is sought under the first clause for injury done "by an intoxicated person," the adjudicated cases are practically unanimous that when the plaintiff has proved the unlawful sale to a person on whom she is dependent for support, and the intoxication of such person thereby produced and an injury done by him while in that condition to her means of support, she has made the case for which the statute provides. In other words, the statute indulges in the reasonable presumption that an act done to the injury of his family by a person whose faculties are abnormally excited, or confused by drink, especially where the act is of a character not ordinarily to be expected from a sane and sober person, is the result of his intoxication. If when these have been shown the defendant claims that notwithstanding the drunkenness so wrongfully occasioned, the injurious act is wholly chargeable to some other cause or influence, it is open to him to establish that fact in defense. It is certainly not required of the plaintiff, that, after proving the wrong-

ful sale of the liquor by defendants to her husband, his resultant intoxication, and his suicide while in that condition (and upon each of these points there was evidence on which the jury could properly find in her favor), she must then proceed to prove by a preponderance of the evidence that the deceased would *not* have committed suicide had the defendants not sold him the liquor. We find no precedent or authority imposing that burden upon her, and we can conceive of no good reason for establishing such a rule.

Numerous other questions are pressed upon our attention in argument, but we have said enough to indicate the necessity of ordering a new trial, and other points, which we do not discuss, are not likely to arise on another hearing.

For the reasons stated, the judgment of the District Court is *reversed*.

OXFORD JUNCTION SAVINGS BANK, Appellant, v. F. E. COOK, Appellee.

Examination of witness: OBJECTION TO EVIDENCE. A party cannot

- 1 wait until a witness has answered and then object if the evidence is not satisfactory; his remedy after the answer is by motion to strike.

Instructions: STATING THE ISSUES: CONSENT OF PARTIES: ESTOPPEL.

- 2 Conceding the impropriety of making a literal copy of the pleadings in stating the issues to the jury, a party who has consented to such procedure cannot insist that it was erroneous.

Bills and notes: DEFENSES: INSTRUCTIONS. A defendant in a suit

- 3 on a promissory note alleged in defense that the note was given to secure money with which to purchase horses and that he signed the note simply as surety, that to indemnify him this defendant retained an interest in the horses so purchased, but that he released his interest upon an agreement of plaintiff to discharge him from such liability; that after such discharge plaintiff appropriated the proceeds of certain other notes belonging to him and deposited as collateral security for the note

in suit. Held, that an instruction that if the agreement contended for by defendant was proven he was absolved from liability on the note and entitled to have his collateral restored to him was correct; but if erroneous the plaintiff could not complain.

Verdict: RECALL OF JURY: CORRECTION OF ERROR. After the return
4 of a sealed verdict the court has no authority to recall the jury and send them out under further instructions with a view to further findings which shall in effect declare the rights of the parties to be other or different than are found and declared in the sealed verdict, but may recall and send them back with instructions to correct a manifest error in form, or to supply an omission of some matter necessary to complete the verdict as already found.

Appeal from Jones District Court.—HON. W. G. THOMPSON, Judge.

TUESDAY, MAY 7, 1907.

ACTION at law on a promissory note. The defendant pleaded defensive matter, and also set up a counterclaim. Trial was had to a jury, resulting in a verdict and judgment for defendant. Plaintiff appeals.—*Affirmed.*

D. H. Snoke and Remley & Remley, for appellant.

F. O. Ellison, for appellee.

BISHOP, J.—The note sued upon bears date July 21, 1904, is for \$300, payable on demand, with interest, and is signed by defendant and Joe Wiceman. The answer admits the execution of the note, but as matter of defense thereto says that said note and another note for \$200 had been given to plaintiff for money borrowed by Wiceman and N. D. Cook, son of defendant, to purchase horses for shipment, and that the money was so used; that the relation of defendant to the transaction was that of a surety only; and that he had a security interest in the horses so purchased until both said notes were fully paid. It is then

alleged that, when it was proposed by Wiceman and N. D. Cook to make shipment of the horses, he (defendant) refused to permit the shipment to be made in the name of Wiceman until the notes had been paid. And it is said that thereupon plaintiff bank, acting through its cashier, orally agreed with defendant that in consideration of the consent of defendant to permit shipment to be made in the name of Wiceman, and the relinquishment of all interest which he (defendant) had in the horses in question, the bank would release defendant from his liability on said notes, and would return to him certain collateral notes which had been deposited by him with the bank as security for the note in suit and the \$200 note mentioned. The allegations follow that, in consideration of such agreement, defendant did release his interest in the horses, and did consent to the shipment thereof in the name of Wiceman, and that they were so shipped. In a counterclaim defendant pleads that the \$200 note referred to in the answer, and the note in suit, were executed at the same time. The deposit of collateral notes as referred to in the answer is then alleged, and such notes are in general terms described. Then follows allegation of an agreement with plaintiff for release, and performance thereof on his part, substantially as alleged in the answer. And this is followed by allegation of a demand for the return of the collateral notes, and a refusal; that plaintiff has collected said notes and appropriated the proceeds, and the amount is said to be \$500. In a reply, the plaintiff denies the agreement which is pleaded by defendant. It admits the execution of the \$200 note as alleged in the answer, admits the deposit by defendant of the collateral notes as described in the counterclaim, also admits the collection of a portion of such collateral notes, but says that the amount thereof has been applied in liquidation "of the original indebtedness represented by said notes (the note of \$200 and the note in suit) and overdrawn

account"; denies any misappropriation, and denies that anything is due defendant.

I. Defendant assumed the burden of proof, and, in the course of the trial, called to the witness stand his son, N. D. Cook, and interrogated him with reference to the terms of an agreement entered into between Wiceman and himself on the one part, and defendant on the other part, whereby defendant was to be the owner of all horses purchased until the notes given to the plaintiff bank were fully paid. The witness responsively related the agreement, whereupon plaintiff objected on the ground that the conversation was in the absence of plaintiff, and therefore incompetent. The objection was not timely, and for this reason, if for no other, was properly overruled. A party may not wait until an answer is given, and then object if such answer is not satisfactory. *State v. Marshall*, 105 Iowa, 44. If, for any reason, the answer was thought to be improper, advantage should have been taken thereof by motion to strike; but this was not done.

II. Complaint is next made of the refusal of the court to give an instruction to the jury as requested. We shall not set out the request. It is sufficient to say that the essential features thereof were embodied in the instructions given, and in as favorable language as plaintiff had right to expect.

III. It appears that, in preparing the charge to be given the jury, the court used literal copies of the pleadings filed in the action for and as a statement of the issues, and, relying on what was said in *Swanson v. Allen*, 108 Iowa, 419, on that subject, it is now insisted that this was error; but, by an additional abstract filed by appellee, it is made to further appear that the course so pursued by the court was on consent of the parties, and appellant has not seen fit to question this by matter of record. Conceding, then, the impropriety in

1. EXAMINATION
OF WITNESS:
objection to
evidence.

2. INSTRUCTIONS:
stating the
issues: con-
sent of parties:
estoppel.

general of the course pursued, appellant is in no position to complain.

IV. The fifth and sixth instructions given are complained of, and we shall consider them together. In the fifth instruction, the jury was told that, as defendant admitted

3. **BILLS AND
NOTES: de-
fenses: in-
structions.**

his execution of the note in suit, plaintiff should be allowed the amount due on said note, with interest, "subject, however, to have deducted from such amount, the amount you find, if any, due defendant on his counterclaim as hereinafter instructed." In the sixth instruction, it was said in respect of the counterclaim — and we follow the language with sufficient closeness — that such of the items thereof as were found due and unpaid should be allowed defendant and deducted from the amount found due and unpaid on the note in suit, and the difference so found, if any, will be your verdict in favor of the party in whose favor you find such difference; but you are also instructed that defendant pleads as a defense an oral agreement with plaintiff for his release from liability on the two notes signed by him, and the return to him of the collateral notes deposited by him as security, in consideration of his consent that the horses about to be shipped, should be shipped in the name of Wiceman. "On this point you are instructed, if you find that such an oral agreement was made, and further that defendant did in pursuance thereof permit Wiceman to ship the horses in his own name, and that the horses were so shipped, then you will be warranted in finding a verdict for defendant, without regard to any amount due on said two notes of defendant, or any amount you find due defendant on his counterclaim, but you will then find for defendant the amount of the collaterals as your verdict in favor of defendant from the evidence, in case you find the oral contract was made as above instructed."

It must be confessed that the instructions are not to be commended as models of form, lucidity, and balance; but

must they be condemned because faulty in law, or misleading in method and clearness of statement? Counsel for appellant, in their attack upon the fifth instruction, say that there was error, for that under the pleadings there was no issue which would permit a recovery by plaintiff on the note, and at the same time allow defendant to recover anything on his counterclaim; that the jury should have been plainly told to allow plaintiff the amount due on the note in suit, unless they found that there had been an agreement to release. But, in our view, this is not adequate to a disposition of the question. It is evident that the fifth instruction was intended to present plaintiff's case from the most favorable possible point of view. The jury was told that plaintiff was entitled to recover in the full sum demanded in its petition, subject only to having such sum reduced or wiped out by a finding that the counterclaim of defendant had been proven in whole or in part. Surely, as to plaintiff, there was no error in this. Leaving out of sight for the moment the defensive matter pleaded in the answer, the allegation of the counterclaim is that with the making of the note sued upon there was a deposit of collateral notes, some of which, at least, had been collected, and the proceeds retained by plaintiff.

Now, on plainest principles, plaintiff was bound to account for the moneys so collected, and conceding that out of such moneys the \$200 note had been paid, leaving a balance still on hand — and this plaintiff does concede in evidence — there could be no possible justification for a refusal on its part to apply such balance in payment of the note in suit; nor could there be warrant for the rendition of a judgment in its favor for any more than the difference between the amount remaining in its hands and the amount of the note sued upon. Of course, the theory of the counterclaim is that, in virtue of the release of defendant from liability on the notes, he became entitled to have the collateral notes, or the avails thereof, restored to him in toto.

He does not offer to make any deduction in case he shall fail to make good his defense of release. But for this the law will not permit him to be penalized by the entry of judgment against him for more than in fact he owes. Quite to the contrary, the law will make the offer for him.

Now, in our view, the only vice of the instruction lies in the fact that it ignores the defense of release as pleaded in the answer — a defense distinct from the counterclaim, and, if proven, complete in itself. But this was error of which the defendant only could complain.

Upon fair analysis, we think the sixth instruction should also be sustained. In its initial sentence, the thought of the fifth instruction seems to have been carried along; but, following this, the jury was told, in substance, that, if the agreement contended for by defendant both in his answer and counterclaim had been proven, then defendant was absolved from all liability on the notes signed by him, and was also entitled to have his collaterals restored to him intact, and they should so find. And inasmuch as plaintiff had refused to deliver such collaterals, on familiar principle, defendant was entitled to a money judgment for the value thereof. We conclude that the correctness of the instruction as matter of law is not open to serious doubt, and we are constrained to believe that on fair reading the thought thereof was sufficiently clear to be understandable by the average juror.

V. The court submitted to the jury three forms of verdict: One for use in case of a finding in favor of plaintiff, with a blank for the amount; one for use in case of a finding in favor of defendant, with a blank for the amount; and the third for use in case of a general finding in favor of defendant.

4. VERDICT: recall of jury: correction of error.

The jury retired late in the day, and there was an agreement between the parties for a sealed verdict. During the night a verdict was reached, sealed up, delivered to the bailiff, and the jurors separated and went to their homes.

After the opening of court next morning, the verdict was opened, and was found to be a general verdict in favor of defendant; that is, the third form submitted with the instructions had been used. Nothing further was done until the day following, when, the jurors having been ordered to take seats in the box on request of defendant, the court gave a further instruction as follows: "You are instructed to retire and determine the amount you find due the defendant, if anything, and state the amount thereof in your verdict." Whereupon the jury, after retirement, returned a verdict in favor of defendant assessing the amount of his recovery at \$508, and upon this verdict judgment was entered. Having objected to all these proceedings, and saved exceptions, the plaintiff now contends for reversible error.

We are not disposed to concede merit in the contention. To begin with, it cannot be considered that the verdict as first returned represented a finding to the effect that defendant had not been released on his notes, but that the debt had been paid from collections made by plaintiff on the collaterals. This is true because it was conceded on all hands that such collections were greatly less in amount than the face of the notes given to the bank. The only way, therefore, in which a verdict could have been found in favor of defendant, was by adopting the theory that an agreement for a release as alleged in the answer had been proven. As said by counsel for appellant in argument, only two forms of verdict should have been submitted; and this is equivalent to saying — as in truth it must be said — that either plaintiff was entitled to recover upon the note sued upon, subject as to amount to the application of payments arising from collections on the collaterals, or defendant was entitled to a verdict for the value of the collaterals.

Now, we agree that the court may not after a sealed verdict recall the jury to the box and send them out under further instructions, with a view to securing a further finding, which shall in effect declare that the rights of the re-

spective parties are other or different than as found and declared for in the sealed verdict; but no good reason exists in law why the court should not recall and send back a jury to correct a manifest error in form, or supply an omission of some matter necessary to the verdict as found, and thus complete the verdict, to the end that the party favored by the finding as made may have the full benefit to which thereunder, and in law, he is unquestionably entitled. We have frequently so held. In *Higley v. Newell*, 28 Iowa, 516, the action was on a note. The jury returned a sealed verdict as follows: "We, the jury, find for plaintiff." When court again convened, the jury was recalled, and again sent out under instructions to put their verdict in form. This they did by adding thereto the amount of the note sued on with interest. We held there was no error. A similar situation was presented in the case of *Lee v. Bradway*, 25 Iowa, 217, and in sustaining the judgment we said: "In view of the issues, the subsequent retirement of the jury was no more than the putting of their verdict in form." In *Wright v. Wright*, 114 Iowa, 748, the action was for board at a certain price per week. A sealed verdict was returned, and upon being opened at the convening of court it was found to be in this form: "We the jury, find for plaintiff, and assess the damages at \$5 per week." The jury, on being recalled, and again sent out, returned their former verdict, with words and figures added, "for 87 weeks, \$435." In disposing of the contention for error, we said: "The plaintiff's claim was for 87 weeks, and there was no controversy but that, if entitled to recover at all, she was entitled for that length of time. Hence the addition made to the verdict was the correction of a formal error." See, also, *Hamilton v. Barton*, 20 Iowa, 505; *Roberts v. Roberts*, 91 Iowa, 228. Now here, as we have seen, the defendant, if entitled to a verdict at all, was entitled to a verdict for the value of the collateral notes, and according to the evidence for plaintiff — undisputed by defendant — such notes had all

been collected by it, save one, and that was collectible when due. Accordingly, there was no controversy upon the subject of amount.

So, too, we find nothing of merit in the further contention of plaintiff that a different result should obtain in view of the length of time which elapsed before the jury was recalled, and the fact that some of the jurors had conversed with others concerning the verdict, etc. The jury was not recalled to pass upon any question of right left undetermined by it, but simply to complete its work by making calculation of the amount due defendant. It is not conceivable that the performance of this duty could have been influenced by the matters relied upon as constituting prejudice.

VI. Lastly, it is said, on behalf of appellant, that the verdict is not supported by the evidence, and is excessive. Respecting the agreement alleged in the answer, the oral evidence was in direct conflict. This could not have come about, under the circumstances, save that the witnesses to the point on one side or the other consciously swore falsely. But the question in dispute was for the jury—a finding might be made either way—and the verdict must be regarded as conclusive. It is said that the verdict was excessive in two respects: (1) That the collaterals did not amount to \$508; (2) that, under the agreement with defendant at the time of deposit, the collateral notes were to secure any other unsecured indebtedness held by the bank against him, and that a portion of the proceeds of collection had been properly so applied. The record discloses that the face amount of the collateral notes was \$452; each note antedated the trial by more than a year, and each bore interest at 8 per cent. from date. The notes are not brought into the record, and we are not advised of the dates of payment. Counsel does not advise us of the amount of the excess in the computation, and we have no accurate means of determining such amount, if any, for ourselves. It would

seem, however, that no serious error could have been made. As to the second matter of contention, it is sufficient to say that no such agreement was pleaded, and it was not asked that the existence thereof, and of the rights of plaintiff thereunder, if existing, be submitted to the jury. Moreover, there is no suggestion in the record that defendant is not solvent, and no reason appears why plaintiff may not in a proper proceeding enforce collection of any other obligation it may hold against him.

On the whole, we conclude that there was no error in the judgment, and it is *affirmed*.

IN RE ESTATE OF JOHN C. P. ROBB, Minor, Appellant, v.
EDGAR J. ROBB, Guardian.

Guardian and ward: SETTLEMENT: BURDEN OF PROOF: EVIDENCE. A guardian who claims a settlement with his ward after he has become of age has the burden of proof on that issue. Evidence reviewed and held to sustain the burden.

Appeal from Marshall District Court.—HON. G. W. BURNHAM, Judge.

TUESDAY, MAY 7, 1907.

TRIAL on objections to a guardian's report. The objections were overruled, and the guardian discharged. The ward appeals.—*Affirmed*.

Boardman & Lawrence, for appellant.

Theo. F. Bradford, for appellee.

SHERWIN, J.—In October, 1894, Edgar J. Robb, the appellee herein, was appointed the guardian of his minor brother, John C. P. Robb, and duly qualified as such. In

November of the same year, he received from the sale of real estate belonging to his ward a little over \$600. He made no report from the time of his qualifications as guardian until the latter part of May, 1904, when he filed a report in answer to a citation requiring him to do so. To the report then filed, the ward filed exceptions, and upon such exceptions a trial was had which terminated in the report being sustained. There is no material difference between the parties as to the amount for which the guardian should account, if he is now liable to account for anything. The controversy in the case arises over the question of whether there was a settlement of guardianship matters with the ward after he became of age, and such controversy presents a question of fact only. Some time before the ward became of age, he and his guardian entered into the restaurant business as equal partners, and continued therein for a term of not quite one year. The partnership was then dissolved; the ward retiring from the firm. At about that time, the exact date not being material, certain real estate was bought by the appellee, and the title thereto placed in the name of his ward, and the appellee claims that the property was paid for by him from his own funds, conveyed to the appellant in settlement of his guardianship accounts and in settlement of the partnership accounts between them. The appellant, on the other hand, contends that he received the property as his portion of the earnings of the restaurant business during the existence of the partnership, and that the amount due him from the appellee as his guardian has never been paid or in any way settled.

The burden of proof is upon the appellee to prove the settlement claimed by him, and while the evidence before us, aside from the statement of the two parties, is not very direct or explicit, we are inclined to the view that the judgment of the trial court, who had an opportunity to see and hear the witnesses, should not be disturbed. The parties themselves are in direct conflict on the question; but there is

evidence of two witnesses tending to show that the settlement was in fact made as contended by the appellee. The strongest circumstance against the settlement is the fact that, subsequent to the time when it is alleged to have been made, the appellee filed a voluntary petition of bankruptcy under oath, in which he alleged that he owed his ward \$1,000. If this statement were unexplained, it should be held, as a matter of law, that the appellee cannot now assail the truthfulness or the correctness of that statement, for a solemn declaration of that nature should estop the declarant in future judicial proceedings; but, in the instant case, the appellee gives a reasonable excuse for making the allegation in his petition in bankruptcy. He says that, at the time of the settlement with his ward, he neglected to take a written receipt or discharge, and that, after the settlement, and before he filed his petition in bankruptcy, his ward refused to execute a receipt, and claimed that there had been in fact no settlement of his guardianship accounts. Giving to the finding of the trial court the weight to which it is entitled, because of the court's opportunity to see and to hear the witnesses, and from our own examination of the record, we reach the conclusion that the judgment should be *affirmed*.

W. G. W. GEIGER, Appellant, v. ROBERT GAIGE.

Garnishment: PERSONAL LIABILITY OF GARNISHEE: DEFENSE. An administrator against whom a judgment has been entered as garnishee at the instance of a creditor of one of the heirs to the estate, and who, for the purpose of defeating the garnishment, paid the money over to the heir and procured his discharge, cannot defeat a personal action against him for the same by showing that the creditor made an unsuccessful attempt in the probate court to have the order of discharge set aside.

Appeal from Cedar District Court.—HON. WM. G. THOMPSON, Judge.

TUESDAY, MAY 7, 1907.

ACTION to recover judgment by plaintiff, as assignee of Kate Smith, against defendant, who, as administrator of the estate of Robert H. Adams, had been adjudged indebted as garnishee to said Kate Smith, creditor of one H. T. Adams, who was under the will of Robert H. Adams, his father, entitled to a distributive share in the estate. It is alleged that defendant administrator wrongfully secured his discharge by the probate court on paying over to H. T. Adams his distributive share, without disclosing his liability as garnishee, and thereby defeated the garnishment, and this action was brought to recover personal judgment against him on that account. There was a judgment for the defendant on a trial without a jury, and the plaintiff appeals.—*Reversed.*

W. G. W. Geiger, pro se.

No appearance for appellee.

MCCCLAIN, J.—On a former appeal in this case, 105 N. W. 1007 (not officially published), it was held that defendant's demurrer to plaintiff's petition was improperly sustained by the lower court, and the case was sent back for a new trial. Subsequently the defendant filed an answer, setting up as bar to plaintiff's right of action the fact that his assignor, Kate Smith, appeared in the probate court after the discharge of defendant as administrator was granted without notice to her, she being one of the distributees of the estate, and moved to set aside the discharge on the ground that it was wrongfully granted, inasmuch as the administrator was thus relieved from liability under the garnishment in her favor, and that this motion to set aside the discharge was overruled. But we think this proceeding in behalf of Kate Smith in the probate

court did not bar an action by her or her assignee, the plaintiff herein, to recover a personal judgment against defendant as garnishee on account of his wrongful action in securing his own discharge for the purpose of defeating such garnishment. True, he was garnished as administrator, but this garnishment imposed a duty upon him to respond out of funds then in his hands, and, if by his own wrongful act in paying over the money to plaintiff's debtor and procuring a discharge in the probate court he defeated the payment of the debt out of the assets of the estate in his hands belonging to H. T. Adams, the debtor in the garnishment proceeding, then he ought to respond personally in damages.

The trial court erred, therefore, in rendering judgment for the defendant, and such judgment is *reversed*.

JAMES ARMENT, Appellant, v. ELIZABETH ARMENT.

Admission of evidence: HARMLESS ERROR. On the trial of a law
1 action to the court, it will be presumed that any error in admitting incompetent evidence is cured by a withdrawal of the same.

Guardianship: INSANITY: EVIDENCE. In a proceeding for the ap-
2 pointment of a guardian for a person of unsound mind, under Code, section 3219, the evidence is reviewed and it is held that defendant was not in such mental condition as to require a guardian to manage and control her property.

Appeal from Tama District Court.—HON. OBED CASWELL,
Judge.

TUESDAY, MAY 7, 1907.

ACTION for the appointment of a guardian for defendant, under the provisions of Code, section 3219, on the ground that defendant was a person of unsound mind.

Plaintiff was appointed temporary guardian, but on trial to the court, a jury being waived, it was found that defendant was not of unsound mind, and not in such a condition mentally as to need a guardian to manage and control her property, and judgment was rendered for the defendant, from which plaintiff appeals.—*Affirmed*.

J. R. Caldwell, for appellant.

Struble & Stiger, for appellee.

McCLAIN, J.—The defendant is the widow of Isaac N. Arment, who died in 1892, and by will devised and bequeathed his real estate and personal property to this defendant, and to his son James who is the plaintiff, and to his daughter Elizabeth, since married to one Bolicheck. No provision for the elder son Levi was made in the will. At the time of the execution of the will deeds for the real estate devised to James and the daughter were executed by testator, in which the defendant joined. The personal property was distributed in accordance with the provisions of the will, and the estate was fully settled in 1894. The defendant, under the will, took title to the farm of about two hundred acres, which had constituted the homestead, and she already had in her own right a tract of eight acres of land. From 1892 until 1894 she remained on the home farm, her son James and her daughter living with her, and James assisted her in carrying on the farm. In 1894 James left home, and was soon after married, and in 1897 the older son Levi, who was married and had a farm of his own, and who as it is claimed was not provided for in the will because he had received previous advancements from his father, came with his wife to live with defendant, and look after her property for her. According to defendant's testimony Levi came to live on the home farm under some arrangement by which he was to maintain his mother during her lifetime,

and have the farm after her death. But if this arrangement involved the deeding of the farm to Levi at this time, it was not carried out by defendant, and in 1898 Levi removed to his own farm, and the daughter, who had in the meantime been married, came with her husband to live with defendant, the son-in-law paying rent. This arrangement continued for one year, when the daughter and her husband went back to their own farm, and Levi came again to look after defendant's farm for her. At this time, as defendant testifies, a definite contract was made with Levi in pursuance of which a deed to him was executed and recorded, containing an assumption of the obligation to support defendant during life. At the same time the personal property, consisting of stock and implements remaining on the farm and belonging to the defendant, were sold to Levi for a consideration of \$1,500, for which two notes to defendant were executed by him.

The evidence for the plaintiff tends to show that defendant was more inclined to seek advice from Levi than from plaintiff, and that she depended upon Levi to look after such important matters of business for her as the sale of her stock while she was carrying on the farm, after plaintiff left her. When it became known that she had deeded the farm to Levi much dissatisfaction was expressed by plaintiff and his sister as to this disposition by her of the principal part of her estate, and eventually a conference was held by the parties, at which their lawyers were present, with relation to the adjustment of their difficulties. The testimony tends to show that prior to this conference defendant had consented that an effort be made to secure the return by Levi of the property which had been sold to him, provided it could be done without a lawsuit, but when proceedings in court were determined upon by plaintiff, the defendant refused to give any countenance thereto, and has resisted the appointment of a guardian for her. The case is somewhat peculiar in that it is tried throughout on plain-

tiff's behalf on the theory that Levi procured the deed to defendant's farm by undue influence. And yet plainly that is not directly an issue in the case, for Levi is not a party to the proceeding, and plaintiff is in no situation to ask relief on that ground. But the evidence of undue influence is relied upon as tending to show the mental incapacity of the defendant. This was the question for decision by the lower court, and the evidence is to be reviewed with reference to that question alone.

Many errors are assigned on behalf of the plaintiff, as to the admission of statements of nonexpert witnesses in regard to defendant's mental capacity. If the testimony thus admitted over objection was not receivable, the error in admitting it was cured by the action of the lower court in accepting the withdrawal of all such evidence on the part of defendant. It is to be borne in mind that while the action is at law it was tried to the court without a jury, and we must assume that the court disregarded the evidence which was thus withdrawn.

But all the errors assigned for the appellant may be fully disposed of on another ground. It is contended for appellant that the evidence as to mental incapacity is such as to require a reversal of the finding of the lower court, while for appellee it is urged that there is an entire absence of any evidence on which the court could have found such mental incapacity. Now, if on consideration of the evidence presented in the record, we shall find that there was nothing tending to show such mental incapacity as would have justified a finding for plaintiff, then the assigned errors in the admission of testimony offered for appellee will be wholly immaterial, and may be disregarded. We proceed therefore briefly to state our conclusions as to the showing with reference to mental incapacity.

The witnesses for plaintiff, who testified to the conclusion that defendant was incapable of managing her property and

affairs, based such conclusions entirely upon the conduct of

2. GUARDIANSHIP: defendant in allowing her son Levi to dictate
insanity:
evidence.

her course of conduct with reference to her property, and to have an undue advantage in its management and disposition. Plaintiff testifies that when the estate was settled in 1894 he paid over to Levi for his mother and sister two-thirds of the proceeds of certain cattle which he had sold as executor, and that Levi has never accounted to the mother and sister therefor. But we have no direct testimony that he has failed to account. The money belonged to the estate for distribution, and it does not appear that it was not applied to proper purposes. At any rate, the mother and sister made no complaint until this controversy arose, nearly ten years afterwards, and we think that the circumstance in itself has no bearing on the question whether defendant is incapable of managing her affairs. Plaintiff testifies as to interference on the part of Levi in the management of the farm, but, so far as he is specific, his testimony tends to show personal hostility between him and his brother rather than any interposition by Levi prior to the deed of the farm to him by his mother. It does appear that two or three animals belonging to the mother were taken from the farm by Levi, with the mother's consent, but it also appears that she gave other property to the plaintiff without consideration.

It is claimed that the sale of the remaining personal property of the farm to Levi for a consideration of \$1,500 was improvident, as the property was of the value of between \$3,000 and \$4,000. But we would hardly be justified in saying that the sale by the defendant to Levi of this property at less than its possible value was any evidence of mental incapacity. The defendant was giving up farming under an arrangement by which Levi was to support her for the balance of her life; and if she saw fit to give him some advantage in disposing of the property on the farm to him, it is hardly to be attributed to her as such recklessness

as to show that she did not realize the significance of her action. The deeding of the farm to Levi in consideration of an undertaking expressed in the deed that he should support her for the balance of her life was perhaps unwise as viewed from the standpoint of the experience of those who have made similar arrangements. But it was such an arrangement as is not uncommonly made, and defendant expresses her entire satisfaction with it. Certainly a mother, seventy-three years of age, who, confiding in the integrity and judgment of her oldest son, a man of experience and success in the management of his own property, intrusts her welfare and support to him, cannot be said to show a lack of reasonably sound judgment, and if he carries out his agreement to her own satisfaction, a court is not called upon to interfere in the interests of those who might in the absence of a disposition by her be entitled to share in her property after her death. None of the transactions which we have referred to tend, in our judgment, to show the want of mental capacity on the part of defendant. Certainly leniency and indulgence even to the extent of favoritism given to one son is not even presumptive proof of want of capacity on defendant's part. She had the right to give all her property to this one son if she saw fit, and even if her conduct indicated an intention to do so to the exclusion of other children, such intention is not open to criticism in a court. We are impressed with the thought that this whole controversy is one between children as to what their mother ought to do with the property as to which she has a complete right of disposition, and to say the least, such a controversy is unseemly. The fear on the part of plaintiff that the final result of his mother's action will be to deprive him and his sister of the opportunity to share equally with Levi will not justify his having a guardian for his mother while she is living; nor will a commendable anxiety as to whether she will be adequately provided for by Levi under his agreement require a court to appoint a guardian for his mother.

The principal contention, however, for the appellant, is that defendant as a witness showed her "illiteracy, her want of business experience, her incapacity to understand the simplest questions, her inability to give intelligent answers," and otherwise demonstrated her lack of capacity to understand and care for her business interests. In view of this broad contention, we have read in full the testimony of the defendant as set out in more than sixty pages of the abstract, largely by question and answer, and have been strongly impressed with the fact that defendant fully understands what she has done, and has acted with a perfectly rational and justifiable conception of her property interests and her relations to her children. She gives reasons which are entirely rational for her various acts, and explains in a perfectly intelligent manner the arrangement under which she deeded her farm and sold her personal property to Levi. The deed itself, containing covenants on the part of Levi to give her a home and furnish her adequate support during the remainder of her life, is explicit, and such as ought not to be set aside on any showing contained in this record, even if the question as to its validity were now before us for final determination. It is said for appellant that defendant showed her incapacity to understand business by thinking that a will which she proposed to execute, devising the farm to Levi, would not be valid unless he assented to it. But that will was proposed by defendant to Levi under the arrangement by which he was to come back to the farm and afford her a home there, and his consent to the will was therefore a material matter. It is further said that defendant indicated in her testimony the belief that the signature of Levi to the deed was essential. As this deed contained covenants on his part, it was certainly not an indication of serious mental weakness that defendant spoke of his having to sign it with the view of making it binding upon him.

Giving every possible weight to the contentions for ap-

pellant, and looking at the entire record for the purpose of seeing whether there is any evidence in behalf of plaintiff on which, if uncontradicted, the trial court could have made a finding in plaintiff's favor, we reach the conclusion that not even a *prima facie* case was made out for the appointment of a guardian for defendant. We have in other similar cases considered the sufficiency of the testimony offered to prove mental incapacity such as would require the appointment of a guardian on that ground, and find no warrant for such action under a state of facts in any way analogous to that disclosed by the record. See particularly, *Schick v. Stuhr*, 120 Iowa, 396; *Emerick v. Emerick*, 83 Iowa, 411.

For the reasons pointed out, it is unnecessary to consider the other allegations of error, and the judgment of the trial court is *affirmed*.

J. M. INGOLD, Appellant, v. BURT SYMONDS and ETTA J. SYMONDS.

Brokers: ACTION FOR COMMISSION: AMENDMENT: NEW CAUSE OF ACTION. A real estate agent who has prosecuted his action for commission to a final determination on appeal, basing his claim on a breach of his agency contract through a sale by the owner, cannot, upon reversal and retrial, amend his petition and claim his commission because of an alleged breach of the contract by the owner in selling through an auctioneer.

Sale of land: EXCLUSIVE AGENCY: BREACH. A contract giving to a real estate broker the exclusive right to find a purchaser within a given time is not breached by a sale by the owner, though actually made through the medium of an auctioneer.

Appeal from Cedar Rapids Superior Court.—HON. J. H. ROTHROCK, Judge.

TUESDAY, MAY 7, 1907.

SUIT at law to recover a commission alleged to be due for procuring a purchaser for the defendants' land. There

was a directed verdict for the defendants, and from a judgment thereon the plaintiff appeals.— *Affirmed*.

Lewis Heins, for appellant.

Redmond & Stewart, for appellees.

SHERWIN, J.— This is the second appeal in this case. The opinion on the first appeal is reported in 125 Iowa, 83, where a sufficient statement of the facts may be found.

After the case went back for retrial the plaintiff amended his pleadings by alleging that the sale made by the defendants was made by an auctioneer at a public sale, acting as the defendants' agent, and that by selling through such agent the defendants had breached their contract exclusively authorizing the plaintiff to procure a purchaser within a certain time. On the former appeal we held that, while the plaintiff's contract gave him the exclusive right to find a purchaser for the property, the defendants had the right to make the sale thereof themselves, and we reversed the case because of an instruction of the trial court directing the jury to the contrary. The facts appearing in the first trial as well as in this one, and they are not denied, are that, after the defendants had executed the contract of agency with the plaintiff, they advertised the sale of the farm and personal property at auction. They procured auctioneers to do the selling for them, and the land in question was, in fact, sold at public vendue by one of these auctioneers, and one of the questions presented by the appeal is whether the defendants had the right to so sell their land in view of their contract with the plaintiff. However, we deem this question of minor importance in this particular instance, because of the attitude of the plaintiff upon the first trial of the case. He was present at the sale of the land, and, of course, knew the manner of its sale and the instrumentality employed by the

1. BROOKS:
action for
commission:
amendment:
new cause
of action.

defendants to effect the same before he commenced this action; yet in his original pleadings, being the ones upon which the case was first tried, no claim was made that there had been a breach of the contract because of a sale of the property through another agent, and the former trial, both in the district court and on appeal to this court, was conducted along the lines we have indicated. It is a well-settled legal principle that a party to litigation may not split his causes of action and try a case by piecemeal; in other words, he may not present one branch of his case for the determination of the court, and, when unsuccessful therein, begin over again presenting some other matter upon which he relies which might have been presented and determined theretofore. The law will not tolerate the multiplicity of suits growing out of such practice, but requires a party to present his entire claim or demand in one action, and, if he fails to do so, but chooses rather to take his chances on a presentation of a part thereof, he is estopped from further prosecuting the same demand either by an independent action or by an amendment to pleadings which amounts to practically the same thing. *Zalesky v. Home Ins. Co.*, 114 Iowa, 516; *Hodge v. Shaw*, 85 Iowa, 137. The plaintiff herein, as we have heretofore shown, knew all about the sale of this land by the auctioneer long before this suit was commenced, and made no claim on account thereof until after this court had determined by its opinion on the former appeal that the defendants themselves had the legal right to sell the farm notwithstanding the plaintiff's contract. This determination of the question operated to defeat any recovery on the part of the plaintiff on the issues made on the first trial; and to now permit the plaintiff to "mend his hold" by pleading the creation of another agency and the sale of the land through it would be to permit him to present his case in sections and to continually subject the defendants to the expense of a relitigation of a question that should have been presented and determined on the former trial.

But, aside from the considerations heretofore discussed, we are of the opinion that the sale of this property under the personal direction and supervision of the defendants, though the sale was actually made through the medium of an auctioneer, was not a violation of the defendants' contract with the plaintiff. While the plaintiff was therein given the exclusive right to find a purchaser for the farm within a given time, a fair construction of the contract clearly excludes from its operation a sale made by the owner of the land either privately or publicly, and the mere fact that he chose to offer the land at public sale through the medium of an auctioneer acting under his immediate supervision and direction did not create such an agency as would constitute a breach of the contract with the plaintiff. While it is the general rule that an auctioneer is the agent of the vendor for certain purposes, it does not by any means follow that in cases of this kind the auctioneer becomes the agent of the vendor to such an extent as to breach this and similar contracts. As we understand the record, the sale bills were issued by the defendants. They advertised the fact that a sale of personal property and the land in question was to be held at a certain time and place, and there were invitations issued for the attendance of prospective buyers, and it must be presumed that such buyers attended the sale in response to these invitations. This being true, the work of the auctioneer in soliciting bids from those present was in reality nothing more than a continuation of the effort of the vendor to sell his own property, and we are clearly of the opinion that in so doing the defendants did not violate the terms of their contract with the plaintiff.

The appellant makes the further point that, as the defendant Etta J. Symonds held the legal title to the land in question, her husband, Burt J. Symonds, was acting as her agent, and there was thus a double agency; she being an undisclosed principal to her husband. There can be noth-

ing in this claim, however, because the plaintiff knew long before this sale was made, and long before he had taken any steps toward finding any purchaser for the land, if not before the contract was made, that Mrs. Symonds was the owner of the land, and that her husband, Burt J. Symonds, was acting as her agent. In fact, the contract on which the plaintiff sued is signed by Burt J. Symonds alone, and there is therefore nothing in the plaintiffs' claim of a double agency.

The trial court properly directed a verdict for the defendants, and the judgment must be, and it is, *affirmed*.

ELIZABETH FOWLER, Appellant, v. GEORGE CHADIMA, Appellee.

Dower: RELEASE BY WIFE: JOINDER. A husband and wife need not join in the same conveyance to effect a release of the latter's contingent right of dower; a quitclaim of all her interest by the wife alone to the grantee of the husband in a prior conveyance is effective to bar her dower therein.

Appeal from Johnson District Court.—HON. A. O. BYINGTON, Judge.

TUESDAY, MAY 7, 1907.

ACTION to admeasure dower. Petition denied, and plaintiff appeals.—*Affirmed*.

S. H. Fairall, for appellant.

Remley & Remley, for appellee.

WEAVER, C. J.—On and for some time prior to August 14, 1888, the plaintiff herein was the wife of one David H. Fowler, who was then the owner of a quarter section of

land in Johnson county, Iowa. On July 26, 1888, plaintiff made and delivered to her said husband a quitclaim deed, purporting to convey to him all her interest in said land. On August 14, 1888, said David H. Fowler sold and conveyed said land to one Novak by warranty deed in which plaintiff did not join. On October 4, 1888, plaintiff conveyed the same land to Novak by a quitclaim deed in which her husband did not join. Thereafter, and during the lifetime of David H. Fowler, said Novak conveyed the land in question to the defendant herein. In the year 1904 Fowler died, and thereafter plaintiff instituted this proceeding on the theory that her contingent dower right in the land had never been effectually released, and that upon his death she became vested with the fee to a one-third interest in said property. To the petition of the plaintiff setting forth the facts above related, the defendant demurred, on the ground that the averments of said pleading affirmatively show a release of her dower right. This demurrer having been sustained, plaintiff elected to stand upon her petition, and judgment was thereupon rendered against her for costs. From this judgment, she appeals.

The one question thus presented is whether husband and wife must unite in the same deed in order to effect a release of the latter's contingent right of dower. In a brief showing much industry and research, counsel for appellant has arrayed a large number of authorities for our consideration, many of which may fairly be cited in support of his proposition that at common law a joinder of husband and wife in the same deed was necessary to an effectual release of the wife's right of dower; but modern innovations by statute and otherwise, upon common-law rules affecting the property rights of married women, have been so great and are of such radical character that the earlier precedents upon the subject are of but little value, save as matters of history. According to the ancient theory, the individuality and independence of the wife were so merged (or submerged, rather)

in the person and authority of her husband that, generally speaking, she was held incompetent to transact any business, great or small, with reference to her own estate, or with reference to her interest in the estate of her husband, unless he united with her; and, while the husband could not by the conveyance of his real estate defeat his wife's contingent interest therein, yet, even after an absolute conveyance by him of his own estate or interest in such property, his wife was disqualified to release the possibility of a right on her part, which could not ripen into enjoyment except by his death, until he was willing to unite with her in executing the necessary writing for that purpose. If there was ever any good reason for this rule, it has ceased to exist. In many, if not all, of the later cases cited by the counsel for appellant, the decision has been reached, not so much because of reliance upon the common-law rule, as because the terms of the statute of the particular State seemed to require the deed or release to be executed by both husband and wife. Our own statute does not attempt to prescribe the manner or form in which dower may be released. It does provide (Code, section 2919) that a married woman may convey or incumber real estate or any interest therein belonging to her, and may control the same, or contract with reference thereto, to the same extent and in the same manner as other persons. Technically speaking, dower, in the common-law sense of the term, has long been abolished in this State, and the wife's interest in her deceased husband's lands is a distributive share of one-third in fee of all the real property possessed by him during his marriage, which has not been sold on judicial sale, "and to which the wife has made no relinquishment of her right." Now, although a contingent dower right may not be an estate, it certainly does constitute an interest in land which is recognized by the statute as being the subject of relinquishment by her in the life of her husband. Such being the case, it would seem that, under the general terms of Code, section 2919, cited, its

relinquishment may be accomplished by her "in the same manner" as other persons not laboring under the disabilities of coverture would relinquish a contingent or remote interest in like property. So long as the husband retains his title to the land, there is good reason for saying the wife should not be empowered to convey or transfer her dower right to a stranger. There is also obviously good reason for saying that, when a husband has by his separate deed conveyed the fee to a third person, it should not be competent for his wife to convey or transfer her contingent interest to a stranger to the title, and the statute has wisely provided that a wife's contingent interest in her husband's property shall not be the subject of contract or traffic between them; but, when the husband has once conveyed the fee, why should the wife not be at liberty to relinquish her dower interest to the purchaser with or without her husband's consent?

The wife's deed under such circumstances, is not a grant or conveyance, in the legal sense of the term, though we frequently used those terms as applicable to her act. She has no estate in the land which she can grant or convey to another. She has at most a contingent interest, a possibility of an estate which may accrue to her in the event that she outlives her husband, and, while she cannot sell or convey it to another, she can release or relinquish it in favor of the owner of the fee, save only where the owner of the fee is her husband. Her relinquishment adds nothing to the quality of the estate of the fee owner, but it removes a burden or incumbrance therefrom. By enabling a married woman to engage in business in her own name, and to buy, sell, own, and control property as freely and effectively as her husband can do, our statute necessarily subjects her to the ordinary rules of the law of estoppel, and when upon a sufficient consideration moving directly to her, or upon a consideration moving to her husband in the sale of the fee of his land, she, by deed or by formal release, relinquishes her dower right, she should be held estopped to say that, not-

withstanding such conveyance or relinquishment, she still demands an admeasurement of dower upon the husband's death. Indeed, it was the general rule, even at common law, that the wife's release of dower was held operative as an estoppel, rather than as a contract. *Gillan v. Swift*, 14 Hun (N. Y.) 574; *Reiff v. Horst*, 55 Md. 42. And decisions holding her estopped by her separate deed were not unknown before the modern statutes emancipating women from most of the disabilities of coverture. *Shepherd v. Howard*, 2 N. H. 507; *Fowler v. Shearer*, 7 Mass. 14; *Irving v. Campbell* (Super. Ct.) 4 N. Y. Supp. 103; *Nelson v. Holly*, 50 Ala. 3. She has often been held estopped by her conduct, on which the purchaser of the fee has relied, although no deed of any kind was executed by her. *Wright v. DeGross*, 14 Mich. 164; *Connolly v. Branstler*, 3 Bush. (Ky.) 702 (96 Am. Dec. 278); *Hart v. Giles*, 67 Mo. 175; *Smiley v. Wright*, 2 Ohio, 506.

This court has had no case before it raising the question precisely as it is presented by the record now before us; but we have on several occasions considered questions involving principles which we think must govern our conclusion. For instance, it has several times been held that, till modified by the enactment of Code, section 3154, our statutes empowered husband and wife to enter into contracts with each other for the sale or relinquishment of their contingent rights in each other's property. *Robertson v. Robertson*, 25 Iowa, 354; *Poole v. Burnham*, 105 Iowa, 622; *McKee v. Reynolds*, 26 Iowa, 578. In the last case, the court held that, even if the circumstances of the case made the release from husband to wife invalid as a contract, yet where the release has been executed, and the consideration paid, "the law will estop the husband to disregard the agreement." In the same case, Mr. Justice Dillon, who wrote the opinion says: "Aside from the statute, it is a well-established rule that a wife cannot relinquish her contingent right of dower, except by joining with her husband in a conveyance to a

third person, or, at least, after a sale and conveyance by him, executing to the purchaser from him a release or relinquishment." It is true this remark appears to have been made *arguendo*, but it is significant of the view held by that distinguished jurist as to the broadening effect of the statute upon the rights of married women and of the manner in which a release of dower may be effected thereunder. Again, in *Dunlap v. Thomas*, 69 Iowa, 358, we find that even an oral relinquishment by a wife, made upon consideration paid, and upon which the purchaser relies, will be respected and enforced. Now, Code, section 3154, does no more than to render husband and wife incompetent to contract between themselves concerning their contingent interest in each other's lands. It in no manner affects the right of either as it stood before its enactment to relinquish his or her contingent interests to a third person holding the fee by conveyance from his or her spouse. If, except for this statute, the wife could of her own right and volition relinquish her contingent interest to her husband, and thus enable him by his individual deed to convey an unincumbered title to his grantee, it would seem clear that she could accomplish the same end by making the relinquishment direct to such grantee — and, while the statute last referred to disenables her to relinquish to her husband, it does not in terms or by implication take away her rights in any other respect.

The statutes of the several States bearing upon this subject and kindred subjects are quite dissimilar in terms, and most of the decisions of the courts of other jurisdictions are for that reason not in point with the instant case. In our judgment, to hold that a wife cannot effectively release her dower interest in land to the grantee of her husband, without joining the latter with her in the relinquishment, is to ignore the spirit and purpose of our statute, and revert to burdensome forms and restrictions which the law has long since outgrown. We do not overlook the objection that the instrument in this case is in form a conveyance or quitclaim;

but we think that, under the circumstances as pleaded in the petition and admitted by the demurrer, the court is bound to give it effect as a release of dower.

The ruling of the district court is right, and the decree appealed from is *affirmed*.

LIZZIE WILLIAMS, Appellee, v. H. L. DEAN ET AL., Appellants.

Correction of court records: JURISDICTION. A judge while holding
1 court in one county has no jurisdiction, in the absence of agreement, to make an order correcting the court records of another county, even on notice.

Agricultural societies: POWER TO CONDUCT GAMES. A fair Associa-
2 tion organized as a County Agricultural Society has power to conduct ball games and such other lawful sports as its directors may determine upon.

Same: PERSONAL INJURY: LIABILITY OF DIRECTORS. The directors
3 of an Agricultural Society are not personally liable to a patron of a ball game conducted by the society, who is injured by a wild ball, upon a mere showing of insufficient screens to protect spectators. There must be proof of misfeasance on the part of the directors and then only those who participated in the wrongful act are liable.

Appeal from Cedar District Court.—HON. B. H. MILLER,
Judge.

TUESDAY, MAY 7, 1907.

ACTION at law to recover damages from defendants, who are the board of directors of a county agricultural society, for injuries received by plaintiff in being struck with a baseball, while standing in the amphitheater or grand stand of the society for the purpose of watching the races then in progress. Defendants' demurrer to the petition was overruled, to which they excepted and they thereupon answered, denying the allegations of plaintiff's petition, deny-

ing liability for any act done, and pleading assumption of risk and contributory negligence upon the part of plaintiff. Upon these issues the case was tried to a jury, resulting in a verdict for plaintiff, and defendants appeal.—*Reversed*.

France & Rowell, Wright, Leach & Wright, and Grimm, Trewin & Moffit, for appellants.

Charles W. Kepler & Son, for appellee.

DEEMER, J.—Attached to defendant's motion for a new trial is an affidavit showing beyond all question that the verdict in this case was a quotient one. Appellee says, however, that after the case was tried the judge who heard it, while holding court in another county, upon a motion to correct the record, of which defendants had due notice, struck out his affidavit and made an order declaring that it was not attached to the motion when that pleading was presented to and ruled upon by him. While acting in another county the judge was not the district court of Cedar county. He was simply a judge and as such had no power to correct the records of the district court in another county even upon notice. This is fundamental. *Whitlock v. Wade*, 117 Iowa, 153; Code, sections 242, 243, 247. There was no agreement to submit the matter in vacation and no agreement that the matter should be heard by the judge. Hence we must accept the record as it stands with the affidavit attached showing a quotient verdict. As the verdict was of that kind, the trial court should have set it aside. *Sylvester v. Town*, 110 Iowa, 256; *Denton v. Lewis*, 15 Iowa, 301. This disposes of the case but, as it must be retried and as the points involved are argued and rather intricate, it is deemed advisable to indicate our views upon the propositions presented in argument and likely to arise in the future.

1. CORRECTION OF
COURT REC-
ORDS: juris-
diction.

II. The defendants are the officers and directors of the Tipton Fair Association, a corporation organized under the law (Code, sections 1642, 1647) as a county agricultural society for the purpose of holding county fairs. The society constructed a race track for the purpose of having races, and, in order that the people might better observe them, had erected an amphitheater or grand stand in close proximity to the track. Inside the track it had laid out a baseball ground; the "home plate" being about eighty-eight feet from the inside of the track and about one hundred and forty-five feet from the grand stand. The pitcher's box was located so that the pitcher delivered the ball to the batsman in the direction of the grand stand. Fifty-four feet from the "home plate," and between it and the grand stand, a wire screen had been constructed by some one, sixteen feet long and twelve feet in height, to stop such balls as went by the catcher and to protect those who were in the rear of the catcher. There was no screen in front of the grand stand and no other protection to its occupants than the screen just mentioned. Plaintiff testified as follows: "I went to see the horse racing; bought a ticket at the gate; and, when we got into the grounds, we went into the amphitheater. We wanted to get a seat and sit down because I was sick and tired. We paid to get in. When I got into the amphitheater, I thought I was safe there. I cannot tell how many women and children were occupying seats in the amphitheater. I didn't want to see the ball game. I went to see the races. I never looked at the ball game." She further testified that she could not see the ball game because of the position of the judges' stand which had been erected inside the race track, and that, while she was standing in the grand stand, a ball was thrown or batted by one of the players back into the grand stand, which struck her on the left breast, causing serious and permanent injury.

The negligence charged against the defendants is the

employment of base ball teams to play a game of ball so near the amphitheater, without furnishing sufficient and ample protection to the occupants from batted or thrown balls. The fair association was not made a party, and the serious question in the case is the liability of its officers and directors, defendants herein, in the event there was liability upon the part of any one. The trial court submitted the case to the jury upon the theory that defendants' liability depended upon whether or not they were authorized by law to permit a baseball game upon the grounds of the society, instructing in effect that, if they were not so authorized, then they were liable, otherwise they would not be. If further instructed, as we understand it, that the officers had no authority to permit the playing of baseball upon the grounds of the society, and that, while the game itself was not unlawful, defendants were obliged to use reasonable and ordinary care to protect the occupants of the grand stand from all dangers incident to the playing of the game in proximity thereto, and left it to the jury to say whether or not they used such care. In this there were, as we think, several errors. By section 1658 of the Code Supplement of 1902, in force when plaintiff received her injuries, it is provided that "county or district agricultural societies may annually offer and award premiums for the improvements of stock, tillage, crops, implements, mercantile fabrics, articles of domestic industry, and such other articles and improvements as they may think proper, and so regulate the amount thereof and the different grades, as to induce general competition." And by section 1661a of the same supplement it is provided that "any county or district agricultural society, upon filing with the auditor of state, affidavits of its president, secretary and treasurer, showing what sum has actually been paid out during the current year for premiums, not including races or money paid to secure games or other amusements, . . . shall be entitled to receive from the State treasury, . . . in no case . . . to exceed the sum of \$200.00."

The general rule as to all corporations is that they have such powers "as are expressly provided in the articles of incorporation and such others as are reasonably incident to the exercise of such powers." This is in part a quotation from *Bathe v. Society*, 73 Iowa, 11, wherein the powers of an agricultural society were involved. In *Delier v. Plymouth Agri. Soc.*, 57 Iowa, 471, it was held that such societies were authorized to offer premiums for trials of speed; in other words, to authorize horse racing. Under the provisions of the statutes quoted, we think the society had power to authorize any such lawful games or amusements as its officers and directors might in their discretion see fit to employ or engage for the edification or entertainment of its patrons. These societies are created and exist, not only for educational purposes, but to furnish the people with harmless amusement and entertainment. Recreation and relaxation are quite as important sociologically as education and instruction, and, so long as this is provided along proper lines, they cannot be said to be without the corporate powers of agricultural societies. See, as sustaining this view, *Berman v. State Society*, 93 Minn. 125 (100 N. W. 732; *Knottnerus v. North Park Co.*, 93 Mich. 348 (53 N. W. 529, 17 L. R. A. 726).

The trial court was in error in submitting the case on the theory it did and in saying to the jury in effect that the defendants had no right to authorize or permit the playing of a baseball game upon the grounds of the society. We shall assume that it was the duty of the society itself to use ordinary and reasonable care to protect all persons rightfully upon its grounds from all dangers incident to the playing of the game. That question is fully covered by our recent case of *Williams v. Mineral Park Co.*, 128 Iowa, 32, which is thoroughly and exhaustively annotated in 1 L. R. A. (N. S.) 427. Whether or not the society itself may be held liable for failure to exercise this degree of care on account of its being a sort of arm or branch of the State is not in-

volved in this case, and it is not now decided. But, aside from this question, had the society been a party, it would have been a question for the jury to determine whether or not it was negligent in permitting the game to take place where it did.

We have yet to determine the liability of the defendants, who are the officers and directors of the society. The action sounds in tort, and is manifestly for trespass or perhaps trespass on the case. Defendants were, of course, agents of the society. They were not the society itself; but were acting purely in a representative character. If liable at all, it is because of what they did. If they were guilty of some misfeasance or trespass as distinguished from mere nonfeasance, then they were and are liable, and they cannot shield themselves by saying that they were acting as agents for the society. And in this connection it is entirely immaterial whether their acts were *ultra vires* or within the scope of their authority. No one is permitted to say in an action against him for trespass or for misfeasance that he was acting as an agent in doing the matters complained of and is therefore not liable. Nor is his liability to be measured by the extent of the authority conferred upon him. On the other hand, no agent is liable to a stranger simply for nonfeasance; that is to say, for failure to do some act which his principal commits to his care. He may be liable for breach of contract to his principal, but not to a stranger for a tort. These views are stated with great force and perspicuity in *Murray v. Usher*, 117 N. Y. 542 (23 N. E. 564), and *Cincinnati Ry. Co. v. Robertson*, 115 Ky. 858 (74 S. W. 161). That the same rule applies to officers and directors of corporations, see 3 Thompson on Corporations, sections 4090, 4091, 4096, *et seq.*; *Bruff v. Mali*, 36 N. Y. 200; *Salmon v. Richardson*, 30 Conn. 360 (79 Am. Dec. 255). Nonfeasance is the nonperformance of some act which ought to be performed and misfeasance is the performance of an act in an improper

3. SAME: personal injury: liability of directors.

manner, whereby some one receives an injury. *Illinois Cent. R. R. v. Foulks*, 191 Ill. 57 (60 N. E. 890). So that as defendants may only be held liable for misfeasance, and can only be held liable for the negligent performance of some act which they undertook to perform, it must be shown before they can be held liable that such ones as are sought to be charged did some thing in a negligent or improper manner. Only those who participated in the act can be held, for they were not partners in the transaction, and no one is to be held liable for what another did without his direction or authority. Some knowledge of and participation in the wrongful act must be brought home to the party to be charged. See *Arthur v. Griswold*, 55 N. Y. 400; *Joint-Stock Co. v. Brown*, L. R. 8, Eq. 281, 402; *Hewett v. Swift*, 3 Allen (Mass.) 420. The only showing in the case as to defendants' responsibility is that they were officers and directors of the society, and that the management of the fair association was in the hands of the directors. Manifestly this was not enough to hold defendants liable for misfeasance, as that term is used in the books.

One other question is argued which does not seem to arise upon the record, and that is defendants' liability for the acts of the ball players or for their negligence either in playing the game or in not providing screens so that people in the grand stand might be protected. There is not enough in the record to justify any definite pronouncement upon this proposition. There is a rule which exonerates an intermediate servant where an injury has been committed by a subordinate one under circumstances which make the immediate actor and the ultimate principal liable. This is illustrated by the following cases: *Stone v. Cartwright*, 6 T. R. 411; *Bachelor v. Pinkham*, 68 Me. 253; *Bianki v. Greater Am. Exp. Co.*, 3 Neb. (Unof.) 656 (92 N. W. 615); *Brown v. Lent*, 20 Vt. 529. Not enough facts are disclosed to enable us to say whether or not this rule is applicable to the case. We refer to it in view of the arguments of counsel

and of a new trial. Of course, if the defendants authorized the wrong or in some manner participated in it, then, so far as this feature of the case is concerned, the rule just announced has no application. See cases hitherto cited and *Bath v. Caton*, 37 Mich. 199. Also the many cases cited in the note to 1 L. R. A. (N. S.) 427, *supra*.

Having now covered the entire case, we reach the conclusion that the trial court was in error in the respects mentioned, and the judgment must, and it is, *reversed*.

W. BERGSTROM v. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

Carriers: BAGGAGE: LIABILITY FOR LOSS. A baggage agent has implied authority to receive for transportation as baggage, articles not ordinarily regarded as such, and in doing so the carrier is bound by his acts, unless the passenger is advised that the agent has exceeded his authority.

Appeal from Linn District Court.—HON. B. H. MILLER, Judge.

WEDNESDAY, MAY 8, 1907.

ACTION for value of a trunk checked as baggage over defendant's railway and lost. Verdict was returned for about one-tenth of the damages claimed, and judgment entered thereon. The defendant appeals.—*Affirmed*.

Carroll Wright, J. L. Parrish, and Grimm & Trewin, for appellant.

Smith & Smith, for appellee.

LADD, J.—The plaintiff purchased a ticket over defendant's railroad from Cedar Rapids to St. Paul, Minn.,

and procured two trunks to be checked as baggage, paying for excess weight seventy cents. One of these trunks, with its contents, was lost, and recovery for the value thereof is sought in this action. Defendant's liability for the contents of the trunk constituting plaintiff's personal baggage is conceded. But, aside from such personal belongings as travelers usually carry for their use, comfort, and convenience in making such a journey, this trunk seems to have contained a peculiar assortment of valuables, including a so-called "oriental seal" about four thousand years old and an art lecture and embroidery of the fourteenth or fifteenth century, representing five saints or apostles, each of which articles was thought by the owner to be worth \$1,000 and all of the estimated value of \$3,708.50.

The evidence was in conflict as to whether defendant's baggage master was advised that articles other than personal baggage were in the trunk when it was checked, and the sole question presented for our decision is whether, conceding that he was so informed, the company is bound by his act in receiving and checking the same as personal baggage, or, as put by appellant: Does notice to a baggage agent of a common carrier that a trunk or other receptacle containing the passenger's baggage also contains items not baggage bind the carrier and make it liable for the value of such items not baggage, lost in transit, where the authority of such agent is restricted to that of a baggage agent? Note, the inquiry is not whether the agent had authority to decide what was personal baggage, but, conceding that the articles were not such, could he bind the company by treating them as such in receiving them for transportation. It was held in *Weber v. Railway*, 113 Iowa, 188, that the carrier will not be held liable in such a case where the passenger knows the agent is prohibited by the company from receiving the articles and checking them for shipment as baggage. While plaintiff knew notice to the company that articles other than personal baggage were in the trunk was essential to render defendant

liable therefor in event of loss, see *McElroy v. Railway*, 133 Iowa, 544, he does not appear to have been advised of any limitation on the agent's authority, or that defendant's rules prohibited the carriage of other than personal baggage on passenger trains. For all that appears, he might have supposed that articles other than personal baggage would be received in connection therewith, or that the matter of determining whether this would be done was left with the baggageman. We are of the opinion that he had the right to suppose the baggage agent was the proper representative of the company to determine in what manner the trunk should be shipped.

The company as a common carrier was bound to receive the trunk for transportation, and whether it should be carried as freight, express, or as baggage was for it to decide. It was not unlawful for the company to carry it as baggage, and, as plaintiff desired it to be shipped as such, he must of necessity apply to some one representing the company to ascertain whether it would be so carried. To whom shall a passenger apply in such a case? There can be but one answer to this inquiry, and it is that he may rely upon the agent charged with the duty of receiving and checking baggage for transportation. The company by placing a baggageman in a room, appropriate for receiving trunks and other receptacles for carriage on passenger trains, supplying him with checks to attach, indicating their destination, and allowing him the sole control of checking and determining what shall be loaded on the baggage cars, necessarily holds him out to the public as having authority to decide what will be so checked, loaded and carried as baggage. Otherwise, it must be assumed to be common knowledge of which every one is charged with notice that railroad companies do not and will not carry as baggage anything other than the personal belongings of the passenger. This is not true, nor, as it is not unlawful, is it to be assumed in the absence of proof that the companies have any such rule. They are

free to carry articles other than personal baggage as such, and, as every one knows, make a practice of doing so, as for instance in carrying sample trunks of traveling salesmen. These may be carried under special contracts, but, if so, the public is not apprised thereof; and how is a passenger to ascertain this and upon what terms he too may contract to have articles other than personal baggage checked and carried as baggage? Quite naturally by applying to that agent of the company having charge of its baggage department. Certainly the duty of determining whether an article, though not such, may be shipped as baggage, is within the apparent scope of the baggage agent's authority, and the carrier is bound by his acts with reference thereto, unless the passenger is informed of restrictions upon such authority. The Supreme Court of Massachusetts has held otherwise, *Blumantle v. Railway*, 127 Mass. 322 (34 Am. Rep. 376), though, as we think, without advancing sound reasons for saying that the baggage master in receiving the articles was not acting within the apparent scope of his duty.

The great weight of authority is to the effect that he has implied authority to receive for transportation as baggage articles not ordinarily regarded as such, and that, if he does receive the same for transportation, the carrier will be bound by this act, unless the passenger is advised that in doing so he exceeds his authority. *Minter v. Railway*, 41 Mo. 503 (97 Am. Dec. 288); *Talcott v. Railway*, 159 N. Y. 461 (54 N. E. 1); *Trimble v. Railway*, 162 N. Y. 84 (56 N. E. 532, 48 L. R. A. 115); *Kansas, Ft. S. & M. R. Co. v. McGahey*, 63 Ark. 344 (38 S. W. 659, 36 L. R. A. 781, 58 Am. St. Rep. 111; *Waldron v. Railway*, 1 Dak. 351 (46 N. W. 456); 4 Elliott on Railroads, section 1649; 3 Hutchinson on Carriers, section 1251; 6 Cyc. 668.—*Affirmed*.

FRANK W. WHITCOMB, Apellant, v. L. M. CARPENTER,
Assignee of E. E. Snyder, Appellee.

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Banks and banking: INSOLVENCY: CLAIMS: PREFERENCE. An in-
1 solvent banker who sells a draft, knowing that his corre-
spondent has no funds with which to pay the same, obtains
money therefor wrongfully and holds it in trust for the pur-
chaser; and a claim therefor against his estate is entitled to
preference.

Same. Moneys received by an insolvent bank to be applied to a
2 particular debt, or to be remitted to a creditor of the person
paying the same, are regarded as trust funds and ordinarily
entitled to preference over claims of general creditors in the
distribution of the assets of the insolvent bank; and this right
cannot be defeated by a showing that the assets of the bank in
the hands of an assignee for the benefit of creditors is less than
when the money was received by it.

Appeal from Jones District Court.—HON. B. H. MILLER,
Judge.

WEDNESDAY, MAY 8, 1907.

THE opinion states the case.—*Reversed.*

Dale & Harrison, for appellant.

Jamison & Smyth and *Park Chamberlain*, for appellee.

WEAVER, C. J.—One E. E. Snyder, doing business as
a private banker, under the name of “Bank of Olin,” be-
came insolvent, and made an assignment to the defendant
herein for the benefit of his creditors on December 13, 1904.
A few days prior to the assignment, and at a time when he
knew he was insolvent, and knew that he had no funds in
the hands of his correspondent bank at Chicago, Snyder
sold to the plaintiff a draft on said correspondent for \$190,

and demanded and received for the same from the plaintiff the full par value of such draft. On being presented to the Chicago bank, the draft was dishonored, and, Snyder having failed to pay or return the money so received, plaintiff filed claim therefor against the defendant as assignee, and asked that it be allowed as a preferred claim. It is further shown, without dispute, that prior to the date of said draft the plaintiff herein had made and delivered his promissory note to Snyder for \$600, and that the same was outstanding, and in part at least unpaid. It appears, however, that Snyder had pledged or deposited said note with one Rummell as collateral security for a debt due from him to said Rummell, but the fact of such transfer was unknown to the plaintiff. After giving said note, but whether before or after it was transferred to Rummell is not made clear, the plaintiff paid or sent to Snyder, to be applied upon said note, several sums, aggregating \$175. For \$150 of this money Snyder gave a receipt to the plaintiff, stating that said moneys were received by him "for credit on note." For the remaining sum of \$25 no receipt is shown, but its payment by the plaintiff is not disputed. None of these payments were ever indorsed or applied upon plaintiff's note, but it is conceded that the moneys so received were by Snyder mingled with the funds of the bank and appropriated to its use. For this sum of \$175 the plaintiff filed his claim against the assignee, and, as in the other case, asked that it be allowed as a preferred claim, in the event that, for any reason, it could not be applied and indorsed upon or set off against his said note. As Rummell, the holder of the note, was not a party to the proceeding, it appears that the prayer of the plaintiff to have his claims applied as payments upon the note referred to was denied, and of this ruling no complaint is made. The district court found that Snyder was justly indebted to plaintiff to the full amount of the claims in controversy, but ruled that neither of said claims should be given any preference over those of the general creditors. From

this ruling an appeal has been taken by the plaintiff to this court.

In at least two recent cases, this court has had occasion to consider the extent to which moneys wrongfully received by or deposited in a bank may be treated as trust funds, and

1. **BANKS AND BANKING: insolvency: claims: preference.** claims therefor given preference over those of general creditors. See *Page County v. Rose*, 130 Iowa, 296; *Officer v. Officer & Pusey*, 127 Iowa, 347. The doctrine there approved and applied governs the case now before us, and requires us to hold that the district court erred in refusing the preference which plaintiff demanded. We think it unnecessary to again review the authorities upon this point. It is sufficient to say that the act of Snyder in taking the money of the plaintiff for the draft which he knew was worthless, and which he had no assurance would be honored when presented for payment, was as wrong in law as it was reprehensible in morals. The money was not given to him as a deposit, nor as a loan. He received it upon his expressed or implied representation that he had such moneys or credit with his Chicago correspondent that, upon presentation of the draft, a like sum would be paid to the plaintiff. That representation he knew to be untrue, and he must be held to have received the money wrongfully, and to hold it in trust for the person who paid it to him.

As to the other item, there is even less doubt. As suggested by us in *Page County v. Rose*, *supra*, it is a well-established rule that moneys received by a bank to be applied as payments upon a particular debt; or

2. **SAME.** to be remitted to some creditor of the person paying such sums, are regarded as trust funds, and a claim therefor is ordinarily entitled to preference over the claims of general creditors in the distribution of the assets of the insolvent bank. See *Nurse v. Satterlee*, 81 Iowa, 491; *McCleod v. Evans*, 66 Wis. 401 (28 N. W. 173, 57 Am. Rep. 287); *Central Bank v. Life Ins. Co.*, 104 U. S. 54 (26 L.

Ed. 693); *Brewing Ass'n v. Morris*, 36 Neb. 33 (53 N. W. 1037); *Capital Bank v. Coldwater Bank*, 49 Neb. 789 (69 N. W. 115, 59 Am. St. Rep. 572); *Foster v. Rincker*, 4 Wyo. 484 (35 Pac. 472); *Bank v. Weems*, 69 Tex. 497 (6 S. W. 802, 5 Am. St. Rep. 85); *Bank v. Latimer*, 67 Fed. 30; *Sherwood v. Bank*, 103 Mich. 116 (61 N. W. 352); *Plow Co. v. Lamp*, 80 Iowa, 725; *Peak v. Ellicott*, 30 Kan. 162 (1 Pac. 499, 46 Am. Rep. 90). Snyder confessedly received this sum of \$175 to be applied as payment upon plaintiff's note, and it was his duty to make the proper indorsement of such payment, if the note was still in his hands; or, if the note had been transferred to another, it was equally his duty to turn over the payment so received to the person holding the paper. He failed to do so, and mingled the funds with those of the bank, and, under the rule of the authorities to which we have referred, is chargeable as trustee to that amount. The cases relied upon by the appellee, *Jones v. Chesebrough*, 105 Iowa, 303, and *Bradley v. Chesebrough*, 111 Iowa, 126, are not in point, and do not announce a rule inconsistent with the one which we here apply. In each of the cited cases action was brought by a depositor who had deposited money held by him in a trust capacity with a bank which afterward became insolvent, and it was sought to obtain preference on the theory that the trust character of the funds in the hands of the depositor followed and attached said funds in the hands of the bank. In neither case was the deposit or the possession of the funds wrongful. See, also, *Hunt v. Hopley*, 120 Iowa, 700; *Officer v. Officer*, 120 Iowa, 389. In the case of *Smith Bros. v. Bank*, 107 Iowa, 624, we held that, where a bank receives money wrongfully, "a trust arises as between it and the true owner of the money, for it is a general rule that any one wrongfully possessed of an estate becomes a trustee *ex maleficio*, and is answerable to the party injured as *cestui que trust*."

Council for appellee seek to avoid the effect of our former decisions, by claiming that the record in the present

case shows affirmatively that the assets of the bank in the hands of the assignee were in no manner increased by reason of the wrongful act of Snyder in the sale of the worthless draft, or in the collection of the moneys which he wrongfully failed to apply upon the plaintiff's note. This proposition of fact is said to be supported by evidence offered on part of the defendant showing that, from the time these moneys were received by Snyder, down to the date when he made the assignment for the benefit of his creditors, the assets of the bank and the funds on hand had decreased, with the result that the value of the assets turned over to the assignee was only about \$42,000, while the liabilities of the insolvent bank amounted to about \$165,000. But the mere fact that the moneys and credits which went into the hands of the assignee were less than those which Snyder had on hand at the time when he became chargeable as trustee does not avoid the proposition that the amount which he thus received was larger than it would have been had Snyder not appropriated and put into the funds of the bank these moneys which he should have otherwise applied. The money was mingled with the funds of the bank which were certainly increased by that amount, and the trust character of the sum so appropriated operates to create a lien for its amount upon the entire fund with which it was mingled, and when thereafter the fund is diminished by withdrawals therefrom by the trustee, he is presumed to have withdrawn his own moneys, and, so long as the balance left on hand is equal to or greater than the trust fund, the right of the *cestui que* trust to have it applied to the payment of his claim remains unimpaired. *Sherwood v. Bank*, 103 Mich. 109 (61 N. W. 352); *Peak v. Elliott*, 30 Kan. 156 (1 Pac. 499, 46 Am. Rep. 90); *McLeod v. Evans*, 66 Wis. 409 (28 N. W. 173, 214, 57 Am. Rep. 287). In the latter case, the Wisconsin court says of a case presenting features similar to the one at bar: "The conclusion is irresistible that the proceeds of the trust property [a draft] found its way into

Hodge's hands, and were used by him to pay off his debts or increase his assets. In either case it would go to the benefit of his estate. It is not to be supposed that the trust fund was lost and dissipated altogether, and did not fall into the mass of the assignor's property, and the rule in equity is well established that, so long as trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust." See, also, *People v. Bank*, 96 N. Y. 32; *Bank v. Gas. Co.*, 36 Minn. 75 (30 N. W. 440). In *Boyer v. King*, 80 Iowa, 498, this court quoted approvingly the ruling in the *McLeod* case, *supra*, saying that, as the banker received the money wrongfully, "it will be presumed, in the absence of a showing to the contrary, that it was preserved by them in some form, and that it passed into the hands of their assignee. It is not material, for the purposes of the case, whether the balance was preserved in the form of money or other property. It is only necessary that it appear by presumption of law, or otherwise, that it has been preserved in the hands of the defendant." That presumption we think exists, and is not overcome by the mere fact that the assets received by the assignee were less than Snyder may have held immediately before receiving the trust fund.

For the reasons stated, the ruling of the district court refusing preference to plaintiff's claim is reversed, and cause remanded for further proceedings in harmony with this opinion.— *Reversed.*

CITIZENS' SAVINGS BANK OF OLIN v. P. H. WOOD, Appellant.

Payment: APPLICATION. A debtor has no authority to direct the
1 application of an involuntary payment arising from the foreclosure of a chattel mortgage.

Chattel Mortgages: FORECLOSURE: APPLICATION OF PROCEEDS. A
2 mortgagee of personal property should apply the proceeds arising from a sale on foreclosure to the satisfaction of the

mortgage debt, and not to the extinguishment of a landlord's claim for rent which he may hold by assignment.

Same. A tenant cannot insist that the proceeds arising from a sale
3 of nonexempt property under the foreclosure of his chattel mortgage, shall be applied to the satisfaction of a landlord's claim for rent covering exempt property, which is also held by the mortgagees, so as to clear the exempt property from that liability for the benefit of the tenant.

Appeal from Jones District Court.—HON. J. H. PRESTON,
Judge.

THURSDAY, MAY 9, 1907.

ACTION for rent. Judgment was entered *in rem*. Defendant appeals.—*Affirmed*.

Jamison & Smyth and *Park Chamberlain*, for appellant.

Ellison & Gorman, for appellee.

LADD, J.—One Dalby had rented his farm of three hundred and sixty acres to the defendant Wood for a term of three years, beginning March 1, 1902, at the annual rental of \$1,070. On the 31st day of December, 1903, Wood executed a mortgage covering certain cattle and hogs thereon to secure an indebtedness of \$1,593.75 to one Snyder, and on January 2, 1904, he executed another mortgage on fourteen horses also on the premises to secure an indebtedness of \$996.25 to plaintiff. Dalby began an action to recover a balance of the unpaid rent for 1903, amounting to \$515, on July 27, 1904, aided by a writ of attachment which was levied on the above horses. With the evident purpose of avoiding the enforcement of the landlord's lien against the property covered by their mortgages, plaintiff and Snyder acquired the lease of Dalby by assignment in August, and the attorney of the latter dismissed the action. During the same month plaintiff and Snyder

took possession of the live stock covered by their respective mortgages, and sold the same as provided therein; the former realizing therefrom \$932.55 and the latter \$1,009.30. In the same month Wood was adjudged a bankrupt, and as such was discharged by the District Court of the United States in May of the following year. In the meantime the trustee in bankruptcy took possession of the crops raised on the premises, and, after setting aside to defendant that portion exempt to him as the head of a family, out of the proceeds paid plaintiff and Snyder on the rent \$1,267.53. Unless the proceeds of the property covered by the mortgages should have been applied in satisfaction of the rent, there was a balance of \$417.47 still owing for rent. Of this two-fifths, or \$166.98, belonged to plaintiff, and for this amount recovery is sought. The action was aided by writ of attachment levied on the crops raised upon the demised premises and set aside to the defendant as above indicated. The defense interposed was that, as the landlord's lien was prior to that of the mortgages on the property covered thereby, the proceeds of the sale thereof should have been applied in satisfaction of the rent first, and that, in any event, this should have been done in a sufficient amount to have relieved that portion of crops exempt to defendant as the head of a family. The trial court held otherwise, and the sole question raised by the record is whether this ruling was correct.

The action by Dalby and its dismissal is of no importance, save as explaining the transfer of the lease, and the only significance of the proceedings in bankruptcy is that thereby personal judgment was obviated. It is well settled that the debtor may not direct the application of involuntary payments. Such are those procured through the foreclosure of chattel mortgages. *Tolerton v. Roberts*, 115 Iowa, 476.

And the creditors must have applied the proceeds of the foreclosure sale on the debts secured by the mortgages.

The debtor, Wood, had pledged the horses to the payment of his indebtedness to plaintiff, and the cattle and hogs to the payment of that of Snyder, and thereby assented to the application of the proceeds of foreclosure thereon. The superiority of the lien for rent was by operation of law, and not owing to any reservation on his part. Had Dalby retained the lease, he might have allowed the stock to be taken and sold under foreclosure without waiving his landlord's lien on the crops. He did not owe the debtor the duty of enforcing his claim for rent against any particular property. In so far as the tenant's rights were involved, he might allow other debts to be made out of the property on which he had a lien. The remedy by attachment is not compulsory, and the landlord may proceed to enforce his lien at pleasure if within the statutory period, or may resort to another remedy as he may choose. *Miller v. White*, 25 S. C. 235. Should the tenant dissipate a large part of the property, he may proceed against that which remains as against other incumbrances. *Hammond v. Harper*, 39 Ark. 248. While the landlord may not perpetrate active injury to a junior incumbrance, he is under no obligation to husband the tenant's property for his benefit or that of the tenant. He may look alone to his own interest, and be content to see enough remaining for his security. *Lemay v. Johnson*, 35 Ark. 235. Certainly he does not owe the tenant the duty of enforcing his lien against all or any specific portion of the property. The doctrine of marshaling assets or securities is in no way involved for this equity is never administered at the suit of the debtor. *General Ins. Co. v. U. S. Ins. Co.*, 10 Md. 517 (69 Am. Dec. 174). Had the mortgagees, instead of procuring an assignment of the lease, insisted upon Dalby collecting the rent from other property on which it was a lien, quite a different question would have arisen. But they procured the lease, and through its assignment stepped into Dalby's shoes, and were under no other or greater obligation to enforce the collection of the

2. CHATTEL MORTGAGES: foreclosure: application of proceeds.

rent than he would have been had he retained it. The mere fact that the mortgagor expressed indifference as to what should be done with the property cannot change the result. Having seized it under the mortgages and sold it by virtue thereof, in the absence of any understanding to the contrary, the mortgagee was required as a matter of law to apply the proceeds as stipulated in those instruments. Having resorted to the remedy for the collection of the debts stipulated by the parties, it was not open to them to otherwise apply the proceeds. See *Marziou v. Pioche*, 8 Cal. 522; *Avera v. McNeill*, 77 N. C. 50. Nor is the mortgagor after having so stipulated in a situation to urge that the proceeds of the sale should have been otherwise applied. As plaintiff and Snyder as assignees of the lease then were under no obligation to enforce the landlord's lien against the mortgaged stock, and might elect to do so against any other property subject thereto, it follows that the defense interposed must fail.

What has been said disposes of the point that the proceeds of all the property should have been so applied as to shield that exempt to defendant as the head of a family, and that as the portion of the crops now levied

3. SAME. on were exempt from any indebtedness, save the lien for rent, enough of the proceeds of the stock sold should have been applied on the rent to clear such exempt property. Possibly, if the mortgages had covered exempt and nonexempt property, the debtor might insist upon the nonexempt property being first sold. *Sanders v. Phillips*, 62 Vt. 331 (20 Atl. 104.) See, also, *Frantz v. Hanford*, 87 Iowa, 469. But the hay and grain attached, having been raised on the leased premises, was not exempt from the claim for rent. *Hipsley v. Price*, 104 Iowa, 282. The plaintiff and Snyder had waived the landlord's lien on the stock by foreclosing their mortgages thereon, as they had the right to do, and, as seen, this did not operate to release the remainder of the property subject thereto. Especially is this true

where, as in this case, such waiver was in promotion of the tenant's stipulation setting apart the stock as the security of other claims. The rule with reference to exhausting other security before selling the homestead has no application.

The relief granted was within the prayer of the petition, and the judgment is *affirmed*.

STATE OF IOWA, Appellee, v. THOMAS J. NUGENT, Apellant.

134	237
d138	498

Seduction: DISMISSAL OF PROSECUTION. A defendant in a prosecu-

- 1 tion for seduction is not entitled to a dismissal under Code, section 5536, because the trial has been postponed over the second term at which it was triable, where by agreement it was continued until a civil action for damages involving the same facts had been disposed of, the civil action being on trial at the time the motion to dismiss was ruled upon.

Seduction: EVIDENCE OF OFFER OF SETTLEMENT. One charged with

- 2 seduction may lawfully attempt a settlement of the civil claim for damages and the act cannot be construed in the criminal prosecution as a confession of guilt; and a reference, in the cross-examination of prosecutrix, to the civil action and also to a conversation with defendant's attorney in the presence of defendant with reference to the date of the seduction, did not authorize her examination on redirect as to a proposition of settlement and offer of money to dismiss the civil action.

Evidence. On a prosecution for seduction evidence of the birth

- 3 of a child is admissible, at least in support of the claim of intercourse and the date thereof.

Election between acts. Although a prosecutrix testifies to several

- 4 acts of intercourse yet she cannot be compelled to elect on which she will rely, in a prosecution for seduction, since the seduction occurred at the time of the first act, and the subsequent acts were material as bearing on the relation of the parties and to corroborate the prosecutrix respecting the initial act.

Instruction: ALIBI. An instruction that "if the entire evidence,

- 5 including the *defense* of alibi, upon the whole case raises a reasonable doubt as to the defendant's guilt then you should acquit him" is held to have been without prejudice, although the court inadvertently used the word "defense" where the word "evidence" was intended.

Appeal from Greene District Court.—HON. Z. A. CHURCH,
Judge.

THURSDAY, MAY 9, 1907.

THE defendant was convicted of the crime of seduction, and he appeals. The opinion states the case.—*Reversed.*

C. E. Reynolds, for appellant.

H. W. Byers, Attorney-General, and *C. W. Lyon*, Assistant Attorney-General, for the State.

BISHOP, J.—I. The indictment against the defendant was returned at the March, 1904, term of court, and the defendant appeared at that term in person and by attorney and pleaded not guilty. It seems that preceding this the prosecuting witness, Nellie Breiner, had commenced a civil action against defendant to recover damages growing out of her alleged seduction, and at the August, 1904, term of court, a stipulation was made of record to the effect that proceedings under the indictment should be continued until said civil action had been tried. Accordingly continuances were had at the October, 1904, and January, 1905, terms, respectively. At the March, 1905, term, the State moved for a continuance on the ground of the ill health of the prosecuting witness, and this was resisted by the defendant, for the reasons that the showing was not timely, and was insufficient as to the fact of ill health, and furnished no reasonable assurance that the witness could be produced at the next term of court. The motion was sustained, and we think properly so. Without setting it out in detail, it is sufficient to say that in its facts the showing was sufficient; moreover, as shown by the record, the civil case referred to was on trial at the time the ruling was made. Thereafter, and at the same term of court, the

1. SEDUCTION:
dismissal of
prosecution.

defendant appeared and demanded trial during the term. This being refused, and relying upon Code, section 5536, he moved to dismiss, on the ground that four terms of court at which he might have been tried had passed since his indictment and plea. The motion was overruled, and, in view of the situation as we have outlined it above, it is manifest that the ruling was correct.

II. During the cross-examination of the prosecutrix, the fact was brought out that prior to the indictment she had commenced and there was still pending, her civil action against defendant to recover damages on account of her seduction by him. The witness also admitted having had a conversation with defendant's attorney, in the presence of defendant and his sister, and occurring after the civil suit had been commenced, but before the indictment; and following this admission she was asked by defendant's attorney if she had not on the occasion of that conversation stated that her seduction took place on March 30, 1903. To such question, the witness answered: "I did tell you of that act. You asked a number of questions," etc. On redirect examination, the county attorney was permitted over objections to show by the witness that on the occasion of the conversation referred to in cross-examination, an attempt was made by the attorney, aided by defendant's sister, to induce the witness to accept of a sum of money, which was produced at the time and offered to her, and dismiss her civil suit. Now, the cross-examination — and we have set out above all that has bearing — did not warrant the admission of the matter thus brought out on redirect. Under the circumstances of the case, such matter was not competent or material to any purpose involved in the issue. An offer of compromise of the civil suit made by the attorney, in the presence of defendant and presumably by his authority, was not in law or in fact tantamount to a confession of guilt. Defendant had the right to effect a settlement if he could, and whether this was on motive to redress

2. SEDUCTION:
evidence of
offer of set-
tlement.

a wrong done by him or simply to buy his peace was wholly immaterial. This is but elementary doctrine.

Possibly the court took the view that as defendant had called out part of the conversation in question the State was entitled to all thereof. And in the books there is to be found expression of such a rule. But no warrant is to be found for extending such rule to cover a subject-matter, in itself incompetent, which, although touched upon during the course of the conversation, was not broached in the examination of the witness by the opposite party. 3 Ency. of Evidence, 835. That the error thus pointed out was in all likelihood followed by prejudice, we are bound to presume. There is nothing in the record upon which to predicate a contrary conclusion. The jury was given no instruction on the subject, and as the fact of intercourse was the subject of a direct issue in the evidence, it may very well be that in their deliberations the offer of settlement was regarded as a circumstance unfavorable to defendant. In criminal cases only technical errors which do not affect the substantial rights of the defendant, are to be disregarded as without prejudice. If the error involves a material point in the case, prejudice must be presumed, unless on survey of the whole record the contrary affirmatively appears. Code, section 5462, and cases cited thereunder.

III. The prosecutrix was allowed to testify that she had given birth to a child, as the result of intercourse had with the defendant. This is complained of as error. The complaint is without merit. The evidence was admissible at least as supporting the contention of the prosecutrix that she had had sexual intercourse, and the date thereof. *State v. Clemons*, 78 Iowa, 123; *State v. McGinn*, 109 Iowa, 641.

IV. It is charged in the indictment that the seduction took place on or about November 3, 1902. The prosecutrix testified that the first act of intercourse took place some time in November; that the next act took place March 1st,

following; and that other acts took place on March 15th and March 30th. At the close of the evidence for the State, the defendant moved that the State be required to elect on which act of intercourse as testified to by the prosecutrix it would rely to support the indictment. The motion was overruled, and properly so. The seduction, if such there was, took place on the occasion of the act of intercourse in November. The acts following were material only as bearing upon the subsequent relationship and familiarity of the parties, and to corroborate the prosecutrix in her statement respecting the initial act. *State v. Mackey*, 82 Iowa, 393; *State v. Wickliff*, 95 Iowa, 386. Conceding that a woman might be twice seduced by the same man, still such could not occur where as here — accepting as we must the testimony of the prosecutrix on the point — the relation of lovers continued to exist from the occurrence of the first to the last act. The cases cited by counsel for appellant to sustain his position are not in point. In *State v. Hurd*, 101 Iowa, 391, incest was the crime charged, and in *State v. King*, 117 Iowa, 484, rape was the crime charged. In such cases each separate act of intercourse must be in the very nature of things regarded as a separate crime, and hence must be charged separately. As involved in a continuous relationship, it is manifest that there can be but one seduction no matter how frequently intercourse takes place after the occasion of the first act.

V. One matter of defense relied on by defendant was what is known in law as an “alibi.” On this subject the court told the jury in the charge given that the burden was on the defendant “to establish by a preponderance of the evidence his defense of alibi; but, if the entire evidence, including the defense of alibi, upon the whole case raises a reasonable doubt as to the defendant’s guilt, then you should acquit him.” This instruction is complained of, and, in particular, because of the expression “including the defense of alibi” as it appears

4. ELECTION BETWEEN ACTS.
5. INSTRUCTION:
alibi.

therein. The argument is that, taking the instruction as it reads, the jury was given to understand that before defendant could have advantage from the evidence tending to prove the fact of alibi, he must have established such defense by a preponderance of the evidence relating to the subject. It is evident to our minds that the court inadvertently used the word "defense" where the word "evidence" was intended; that is to say, the court intended to tell the jury that if upon the entire evidence including that addressed to the subject of alibi a reasonable doubt arose as to the guilt of the defendant, then they should acquit him. And this would have been a proper statement of the rule. However, we think it not probable that the jury was led to take an incorrect view of the subject, and accordingly we should not reverse on this ground alone. The situation is not like that appearing in *State v. McGarry*, 111 Iowa, 709, cited to our attention by counsel for appellant. There the jury was instructed that if the defense of alibi had not been established by a preponderance of the evidence on the subject, the jury should not consider such evidence as had been brought before them "as a basis for reasonable doubt"—plainly enough an error carrying prejudice.

We have given consideration to all the matters of error contended for, necessary in view of the fact that the case must go back for a retrial. For the error pointed out in the second division of this opinion, the judgment of the court below must be reversed, and the case is remanded for a new trial.—*Reversed.*

ELLA S. RICHARDSON v. ELIZABETH A. RICHARDSON, Appellant.

Counterclaim. Any new matter constituting a cause of action
1 may be pleaded as a counterclaim against a demand on a promissory note.

Judgments: SERVICE UPON NON-RESIDENT. Service upon a non-resident made outside the State will not render the party a defendant in the case and does not confer jurisdiction to enter a personal judgment against him.

Counterclaim: LIMITATIONS. A counterclaim may be pleaded as a defense to an action although barred, if it was the property of the party pleading it at the time it became barred and was not barred at the time the claim sued on originated.

Fraud: VOLUNTARY CONVEYANCE: PROOF. Where a voluntary conveyance operates as a fraud upon creditors it is not necessary to allege and prove fraud on the part of the grantee.

Appeal from Dubuque District Court—HON. M. C. MATTHEWS, Judge.

THURSDAY, MAY 9, 1907.

SUIT at law on a nonnegotiable promissory note, dated February 10, 1900, signed by C. S. Richardson, and guaranteed by Elizabeth A. Richardson. Elizabeth A. Richardson pleaded an equitable counterclaim, to which a demurrer was interposed and sustained. She appeals from a judgment against her on the pleadings.—*Reversed.*

Hurd, Lenahan & Kiesel, for appellant.

W. S. Wright, for appellee.

SHERWIN, J.—The appellant's counterclaim was an equitable one, based on the allegations that in February, 1900, she became the owner of a judgment against one George W. Richardson, the plaintiff's husband, for some \$2,200 which was rendered October 22, 1898; that said judgment was based on indebtedness against said George W. Richardson which accrued in June, 1896, and June, 1897, and in May and June, 1898; that in October, 1896, and in March, 1898, said George W. Richardson, without consideration, and in fraud of his creditors, conveyed to his wife, the plaintiff herein, all of his property both real and personal. The

plaintiff herein sold and transferred the property so conveyed, and transferred to her by her said husband, and appropriated the proceeds to her own use; that the property so conveyed by George W. Richardson comprised all of his property, and the conveyance left him wholly without means with which to pay the indebtedness represented by the judgment on which the appellant's counterclaim is based or from which it could be collected, thus leaving her without remedy at law to collect the same. She prayed that the plaintiff be denied recovery, that the transfer from George W. Richardson to the plaintiff be declared void, that the plaintiff be required to account for the proceeds of said property, and that said proceeds be applied in satisfaction of the judgment against George W. Richardson. The plaintiff demurred to the counterclaim, on the general ground that it did not state facts sufficient to constitute a defense or cause of action, and, specifically, because the counterclaim did not constitute a cause of action arising out of the contract or transaction set forth in the petition, and, further, because the counterclaim did not constitute a cause of action in favor of both of the defendants against the plaintiff; further, because the action of the plaintiff is based upon a promissory note against two defendants — one the principal and the other the surety on the note — and the counterclaim is based on an indebtedness due only to the surety on the note. The counterclaim shows that the cause of action therein set forth accrued more than five years prior to the commencement of this action, and is therefore barred by the statute of limitations. The demurrer was sustained, and the appellant having elected to stand on her answer and counterclaim, judgment was rendered against her on the note.

The general grounds of the demurrer are not discussed by counsel for either side, and hence they will be disregarded by us in disposing of the case, and

1. COUNTER-
CLAIM. we will turn our attention to the fourth ground of the demurrer. Code, section 3570, provides

that each counterclaim must be stated in a distinct count or division, and must be (subdivision 3): "Any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, against the plaintiff, or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held either matured or not, if matured when so pleaded." It is apparent from the reading of this statute that there is no merit in this ground of the plaintiff's demurrer. This subdivision of section 3570 expressly provides that any new matter constituting a cause of action may be pleaded as a counterclaim against the demand of the plaintiff. The appellee evidently has confused this subdivision with the preceding one, which permits counterclaims arising out of the contracts or transactions set forth in the petition, but the appellant makes no such claim, and the demurrer as to this branch of the pleading is clearly not good.

While the note was signed by C. S. Richardson, and he was named as a defendant in the pleading, it is conclusively shown that he was a nonresident of this State at the time this suit was brought, and that the only service on him of notice of suit was made in the State of Nebraska. He was therefore not a defendant in the case within the legal definition of said word.

2. JUDGMENTS:
service upon
non-resident.

1 Bouvier, 495; *Brower v. Nellis*, 6 Ind. App. 323 (33 N. E. 672); *Jewett Car Co. v. Kirkpatrick Const. Co.* (C. C.), 107 Fed. 622; *Neal v. Singleton*, 26 Ark. 491; *Pollard v. Houston*, 75 Tenn. 689. The service of notice upon him in the State of Nebraska conferred no jurisdiction upon the trial court to render a personal judgment against him, and he was therefore not before the court as a defendant in the case. Code, sections 3514, 3527; *Weil v. Lowenthal*, 10 Iowa, 575; *Darrance v. Preston*, 18 Iowa, 396.

What we have already said disposes of the appellee's contention that the surety on the note in suit cannot inter-

pose the counterclaim in question because not arising in, or being in any way connected with, the transaction in which the promissory note was given. Code, section 3457, provides as follows: "A counterclaim may be pleaded as a defense to any cause of action notwithstanding it is barred by the provisions of this chapter, if it was the property of the party pleading it at the time it became barred, and was not barred at the time the claim sued on originated, but no judgment thereon except for costs can be rendered in favor of the party so pleading it." The record conclusively shows that the appellant had owned the claims set out in the pleading for some time when they became barred, and that they did not become barred until after the claim sued on originated. The demurrer, so far as it involved the statute of limitations, should have been overruled.

But one other point need be noticed; the counterclaim did not allege that the conveyances from George W. Richardson to the plaintiff were taken by her with fraudulent intent. Such an allegation was not necessary, however. The counterclaim did plead that the conveyances to the plaintiff were without consideration and therefore voluntary, and, for the purposes of the demurrer, such allegations must be taken as true. It is the settled rule of this State that where a voluntary conveyance operates as a fraud upon creditors, it is not necessary to allege and prove fraud on the part of the vendee. If the conveyance is without consideration, and made at a time when the grantor is insolvent and in debt, the conveyance is presumptively fraudulent. *Triplett v. Graham*, 58 Iowa, 135; *Gaar v. Hart*, 77 Iowa, 597.

The demurrer was improperly sustained, and the judgment must be, and it is, *reversed*.

3. COUNTER-
CLAIM: lim-
itations.

4. FRAUD: vol-
untary con-
veyance:
proof.

HERMAN KEMPE, Appellant, v. BENNETT & BINFORD.

Fraud: INSTRUCTIONS. The plaintiff in an action for fraud based
 1 upon a general plan of acts and statements intended to deceive, is entitled to have his theory of the case submitted to the jury; and omission of all reference of liability upon proof of the general plan which the court outlined in stating the issues, at the same time instructing that proof of certain alleged acts and statements will not authorize recovery, is erroneous.

Fraud: EXCHANGE OF LANDS: WITHDRAWAL OF EVIDENCE. In an ac-
 2 tion for fraud in procuring title to land, pursuant to a contract for the exchange of properties, withdrawal of evidence as to defendant's representations of the value of his land and by which a deed placed in escrow was obtained, was erroneous.

Appeal from Marshall District Court.—HON. OBED CASWELL, Judge.

THURSDAY, MAY 9, 1907.

ACTION to recover damages for fraud and deceit. Verdict and judgment for defendant. Plaintiff appeals.—*Reversed.*

Boardman & Lawrence and Geo. M. Lyon, for appellant.

J. J. Wilson, for appellee.

MCCLAINE, J.—Plaintiff's cause of action, as indicated by the allegations of his petition and the evidence introduced in support thereof, rests on the general fraudulent wrong-doing of defendants in inducing plaintiff, who had for sale a business block in the city of Marshalltown, subject to incumbrance, to enter into negotiations with defendants for the exchange of the equity in said business block for land in North Dakota represented as being worth \$2,000.

and to execute a deed, blank as to grantee, for the business block, and deposit it with a third person, with the condition that it should not be delivered until plaintiff had examined the North Dakota land, and was satisfied therewith, and then wrongfully procuring the deed to plaintiff's property from the possession of the custodian, filling defendants' names as grantees into said deed, and making conveyance to an innocent purchaser, thus depriving the plaintiff of his property. Other incidents of the general fraudulent plan of defendants, as alleged by plaintiff, consisted in procuring from one Mineah a deed to a half section of land in North Dakota, and delivering to plaintiff's insane wife a deed for a quarter section of said land, retaining title to the balance in themselves until on the complaint of Mineah the remaining quarter section was redeeded to him. With reference to these allegations, which were generally denied, and this evidence, which was to some extent controverted by evidence introduced on behalf of defendants, the court instructed the jury, in stating to them the issues, that plaintiff averred the whole plan and action of defendants in the premises was to cheat and defraud plaintiff, and that the plaintiff was cheated and defrauded out of his real estate; said fraud consisting of the following wrongful acts and statements of defendants: Falsely representing to plaintiff that defendants owned certain land in North Dakota, and that it was of the value of \$2,000; inducing plaintiff to place in the custody of a third person a deed in blank of his Marshalltown real estate; procuring unlawful and wrongful possession of said deed, contrary to the terms and conditions and agreements under which it was deposited; transferring plaintiff's real estate to themselves by wrongfully inserting their names as grantees in said deed; deeding one-half of the North Dakota land procured by them from Mineah to plaintiff without his knowledge; secretly placing the deed therefor of record; and delivering it to plaintiff's insane wife. Having thus stated the issues, or rather the allegations of fraud

on which plaintiff relied, and which the court thereby told the jury would, if proven, entitle the plaintiff to recover, and having further specifically told the jury that the action was based upon the alleged false and fraudulent representations, statements, and acts of defendants, and that plaintiff sought to recover the damages resulting to him therefrom as set forth in its preceding statement of the issues, the court proceeded to instruct the jury that a misrepresentation, to be fraudulent, cannot be an opinion merely, but must be as to a present material existing fact or facts, must be knowingly false, must be relied upon, and must work injury; and that plaintiff's action was based upon the alleged fact that plaintiff had real estate in Marshalltown which defendants by fraudulent statements, representations, and acts obtained the title to and transferred to an innocent purchaser, by falsely representing to him that they would convey, or cause to be conveyed to him, a half section of land in North Dakota; and that defendants in fact owned no such land, and had not conveyed, or caused to be conveyed, to him any land whatever. The jury were further instructed that plaintiff could not recover for breach of contract, nor for refusal to convey to plaintiff the North Dakota property, unless it should be found that the result was brought about by fraud and deceit, and that if they found plaintiff did not rely upon the representations made by defendants, but refused to act until he could see the Dakota land and judge for himself, then he could not recover by reason of any fraudulent representation in regard thereto.

We think that the court did not in its instructions submit for the determination of the jury the issues stated by it in its preliminary statement of the case. In such preliminary statement, it referred to a general plan of defendants to defraud, consisting of a series of wrongful acts and statements, and then it practically told the jury with reference to a part only of these alleged wrongful statements that they would, if proven, not

1. FRAUD: instructions.

entitle the plaintiff to recover; and nowhere told the jury that the proof to their satisfaction of all the alleged wrongful statements would establish the plan to defraud rendering the defendants liable, although it had in the preliminary statement recognized the fact that liability of defendants would result from the establishment of all the facts alleged as showing such fraudulent plan. In other words, the court diverted the attention of the jury from the general issue of fraud and deceit effected by means of a general plan, to the issue as to whether certain portions of the facts would in themselves constitute a right of recovery on the part of the plaintiff, and authorized the jury to find for defendants, notwithstanding the proof of some of these specific facts. It is difficult, without setting out in full the pleadings, the evidence, and the instructions, to make specific the particular errors committed by the court in these instructions. It is sufficient to say that the case was submitted to the jury on a different theory than that outlined in the preliminary statement, and this is a sufficient ground for reversal.

The essential fact to entitle the plaintiff to recover was that defendants, by their wrongful acts and misrepresentations, had induced plaintiff to execute a deed in blank, and deposit it, to be held until he could examine the North Dakota land, which was offered him in exchange, and then, before he had made such examination or accepted the conveyance of said land, procured from the depository the deed to plaintiff's property, and transferred apparent title thereof to an innocent purchaser, thus depriving plaintiff of his property. No such issue was in fact presented to the jury by the instructions, which specifically referred to the facts and circumstances which must be proven to entitle the plaintiff to recover on this theory. That the court must instruct the jury with reference to plaintiff's theory of the case, provided that under such theory he would be entitled to recovery on proof of the essential facts, is well settled. *Owen v. Owen*, 22 Iowa, 270; *Durant v. Fish*, 40 Iowa, 559;

State v. Glynden, 51 Iowa, 463; *Aultman v. Lee*, 43 Iowa, 404; *Williamson v. Reddish*, 45 Iowa, 550; *McKern v. Albia*, 69 Iowa, 447; *Hill v. Aultman*, 68 Iowa, 630; *Burroughs v. Butler-Ryan Co.*, 121 Iowa, 215. These cases are cited by way of illustration only, and many more could be referred to; but the fundamental proposition is elementary that the instructions must relate to the cause of action which plaintiff attempts to establish, and not to some other possible cause of action which might be supported by some of the facts involved. For instance, the court instructed the jury as to the effect of the truth or falsity of the defendants' representations that they had North Dakota land, and that it was of the value of \$2,000. The representation of the value of the land might or might not be material, if the action had been for fraud and deceit in exchanging land to the plaintiff for his property; but the materiality of these representations as a basis of recovery for fraud was wholly different from their materiality as a part of a general plan to defraud plaintiff of his property. The case must be reversed for failure of the court to submit to the jury the plaintiff's theory, which, if the jury found with the plaintiff on the evidence, would have entitled him to a recovery.

With a view to a new trial, it is proper to say, further, that there was error in withdrawing from the consideration of the jury evidence of defendants' representations as to

2. FRAUD: exchange of lands: withdrawal of evidence.

the value of the North Dakota land, and also evidence as to the representations made by them to Mineah, by which they procured the latter to place the title of the North Dakota land in them. These representations would not, in themselves, or taken together, make out a case against the defendants; but they were material in determining whether defendants procured the making of a deed by plaintiff and wrongfully took possession of the same, thereby depriving plaintiff of the title with a fraudulent purpose to injure him. They might be considered by the jury as tending to show a fraudulent plan,

although not in themselves constituting actionable fraud and deceit.

The judgment is *reversed*.

CHICAGO TELEPHONE SUPPLY COMPANY, Appellant, v.
MARNE & ELKHORN TELEPHONE COMPANY, Appellee.

Warranty: PLEADING: ESTOPPEL. Where the plaintiff in an action
1 on a contract for the sale of telephones admits in its reply
that there was a warranty, it is thereafter precluded from
denying that fact.

Proof of parol warranty. Where the memoranda of a sale does
2 not purport to be a complete contract parol proof of a war-
ranty is admissible.

Parol warranty: QUESTION OF FACT. Where a printed warranty
3 upon which plaintiff relies is not made a part of the contract
it becomes one in parol, and it is for the jury to determine
whether the warranty was in fact as printed, or was oral.

Contracts: RESCISSION. A contract may be rescinded for breach
4 of warranty even though severable, if the breach goes to the
entire consideration.

Examination of witnesses: DISCRETION. The cross-examination of
5 a witness is so largely a matter of discretion that its fla-
grant abuse must be shown to justify interference.

Offer of proof: REDUCTION TO WRITING. Error cannot be predicated
6 on a neglect to require counsel to reduce to writing matters
which he expects to prove by a witness, where no request
was made therefor and the court was not asked to strike the
oral statement thereof or to direct the jury to disregard it.

Objection to proceedings. The court may disregard objection to
7 proceedings where no reason is assigned therefor.

Exclusion of evidence: HARMLESS ERROR. In an action for the price
8 of telephones a letter of recommendation from another pur-
chaser to the effect that the instruments were satisfactory
was admissible on the question of whether plaintiff relied
upon an alleged warranty; but its exclusion was not erroneous
where the agent negotiating the sale was afterward permitted
to testify that he exhibited the letter at that time.

Demonstrative evidence: DISCRETION. Permission of tests or
9 demonstrative evidence in the presence of the jury is largely
discretionary and the action of the trial court in the matter
will rarely be interfered with.

Sales: BREACH OF WARRANTY: RESCISSION. Where a number of
10 telephones admittedly of the same design and quality are sold
for use on one system, defendant is not required to test the
entire number to entitle him to rescind the contract for a
breach of the warranty.

Appeal from Shelby District Court.—HON. O. D.
WHEELER, Judge.

THURSDAY, MAY 9, 1907.

ACTION to recover the purchase price of one hundred
and four telephones sold by plaintiff to defendant. Defend-
ant pleaded a breach of warranty and return of the tele-
phones and rescission of the contract on that ground. Trial
to a jury. Verdict and judgment for defendant, and plain-
tiff appeals.—*Affirmed.*

Smith & Perkins, for appellant.

Byers, Lockwood & Byers, for appellee.

DEEMER, J.—On May 30, 1904, the defendant,
through its president and secretary, gave plaintiff's agent
the following order for telephones:

CHICAGO TELEPHONE COMPANY,
Salesman, Lowry.

Sold to Marne & Elkhorn Telephone Company.

Shipped by freight, prepaid.

Number.	Price.
48. No. 33, 1,600 ohm bridging at.....	\$11.50
To Exira, Iowa,	
24. No. 33, 1,600 ohm bridging at.....	\$11.50
To Walnut, Iowa.	
32. No. 33, 1,600 ohm bridging at.....	\$11.50
To Brayton, Iowa.	

Batteries and R. H. blued screws furnished free. On this order and future orders placed by this company 1 telephone free with every 15 purchased.

Phones to be equipped with glass tubular fuses.

Phones to be wired for out ringing only.

Phones to be equipped with two screw lock method.

S. C. PEDERSON, Sec.

WALTER E. POTTS, Pres.

Terms to be cash 30 days after installation.

This agent testified that a certain warranty appearing in plaintiff's printed catalogue was read to defendant's directors at the time the order was taken, and that it was given as a part of the order. This warranty reads as follows:

GUARANTEE.

Material and work guaranteed against inherent defects.

If any part or parts prove defective through any fault of this factory, such part or parts will be cheerfully repaired or replaced without charge, regardless of time that may have elapsed from date of purchase.

All apparatus fully warranted to give satisfaction in the work for which it is designed, when properly installed.

No risk incurred in buying Chicago telephones.

This factory guarantees every part as well as the complete instrument without any time limit.

In this way purchasers are protected by the Chicago Telephone Supply Company, the largest and strongest factory in the world devoted to the production of bridging telephones.

Defendant contends, however, that the sale was by sample, and that as a part of the transaction plaintiff's agent orally warranted the telephones to be as good and would work as well as any on the market, and that if the phones were not entirely satisfactory to defendant company and its patrons, plaintiff would take them back and that there would be no sale. It also pleaded that plaintiff promised to give

a written warranty corresponding in terms to the oral one with each phone. It alleged that the phones did not correspond with the sample, were not as good, and would not work as well as those of other manufacturers on the market; that they were not satisfactory to defendant and its patrons; that a large number of them failed to work; and that plaintiff failed to furnish the written warranty as promised, and that for these reasons it tendered back the telephones and rescinded the contract. Plaintiff pleaded the written warranty in the catalogue as being the only one it made, and averred that it offered and at all times stood ready to comply with the terms thereof, but that defendant failed to do its part and improperly installed the instruments. The case was submitted to the jury on these issues, resulting in a judgment for defendant.

Plaintiff contends that the court was in error in permitting the introduction of parol testimony tending to show the terms of the warranty, insisting that there was either no

1. WARRANTY: warranty, or that it was in writing, and that
 pleading: parol testimony was inadmissible either to
 estoppel. establish a warranty or the terms thereof. As plaintiff expressly admitted in its reply that there was a warranty, it does not now lie in its mouth to say that there was none.

Moreover, the memorandum of sale taken by the agent does not purport to be a full and complete contract, and there is nothing therein which would exclude parol proof of

2. PROOF OF a warranty. Such testimony would in no
 PAROL WAR- manner contradict the order. *Grant v.*
 RANTY. *Frost*, 80 Me. 202 (13 Atl. 881); *Shambaugh v. Current*,
111 Iowa, 121; *McCormick v. Richardson*, 89 Iowa, 525.

This being true, and the written warranty upon which plaintiff relies not being made a part of or inserted in the contract, it became a parol one, although the terms were expressed in print in the printed catalogue. Under such circumstances it became a question of fact for the jury to determine whether

3. PAROL WAR- terms were expressed in print in the printed
 RANTY: ques- catalogue. Under such circumstances it be-
 tion of fact. came a question of fact for the jury to determine whether

the warranty was the one found in the catalogue or one by word of mouth. The trial court so instructed, and as to this there was no error. The jury evidently found that the warranty was in accord with defendant's contention, and there was evidence sufficient to sustain this position and also sufficient to show a breach thereof, and we shall not disturb the findings.

It is the rule for this State that a contract may be rescinded for breach of warranty. *Wernli v. Collins*, 87 Iowa, 548; *J. I. Case Co. v. Haven*, 65 Iowa, 359, and

4. CONTRACTS:
rescission.

many other cases which might be cited. And this is true, although the contract be severable, provided the breach goes to the entire consideration. Another rule is that the parties may provide their own remedies and procedure in case of breach. This, according to defendant, they attempted to do, and it is said that one remedy was rescission of contract for substantial failure of the phones to work satisfactorily. Various rulings are complained of in the reception and rejection of testimony, and to some of these we shall now give attention.

II. The cross-examination of one of plaintiff's witnesses is complained of. This is a matter resting so largely in the sound discretion of the trial court that a very flagrant

5. EXAMINATION
OF WITNESSES:
discretion.

disregard of the rules must be shown to justify us in interfering. That does not appear here, and there was no error of which plaintiff may complain. Indeed we think the cross-examination related to matters inquired about in chief, and that it was within the well-known rule relating to this subject.

Objection being sustained to certain questions propounded by counsel for defendant to some of its witnesses, counsel stated before the jury what he expected to prove by such witnesses. This was objected to by

6. OFFER OF
PROOF: reduction to writing.

plaintiff's counsel. As to one of the witnesses the statement was simply introductory and without any prejudice whatever, for it was essential to

enlighten the court as to defendant's claims. As to the other witness, McCoy, defendant's counsel, stated in substance, after objections had been sustained to some questions propounded by him, that he expected to prove by witness that the company of which he, witness, was secretary, purchased some of the same kind of phones that plaintiff sold to defendant, under like warranties and guaranties, that these phones were installed as defendants were, that they failed to work, and that upon notice plaintiff removed them. The court denied defendant a right to show these matters. While it would perhaps have been better for the court to have required this statement to be put in writing, yet plaintiff's objection was not put upon this ground. And nowhere was the court asked to strike it out, or to direct the jury to disregard it. In view of this record, there was no error in the proceedings of which plaintiff may justly complain. Defendant's counsel had the right to enlighten the court as to what he expected to prove by the witness, and unless objection was made to the oral statement thereof before the jury there was no error in not having the matter reduced to writing.

While counsel excepted to the proceedings, he gave no reason therefor, and under well-known rules the court was justified in disregarding the objections. After the statement had been made, plaintiff's objection to the offered testimony was sustained, and the jury was thus in effect instructed to disregard it.

While plaintiff's agent was negotiating the sale through defendant's board of directors, he presented to them, so it is claimed, a written recommendation signed by the treasurer of another telephone line to the effect that the telephones supplied by plaintiff for their lines were giving satisfaction and that he believed them equal to any telephone made, that they would ring and talk as far as any of equal size, and that the company would do as it agreed. This, he testified, was

7. OBJECTION TO
PROCEEDINGS.

8. EXCLUSION OF
EVIDENCE:
harmless er-
ror.

read to every director present. This recommendation was offered in evidence, but defendant's objection that it was incompetent, hearsay, and not rebuttal, was sustained. Of this ruling complaint is made. As bearing upon the question as to whether or not defendant relied upon the warranty given, this paper might well have been received in evidence. For any other purpose the statement was incompetent and hearsay. But as the witness, who conducted the negotiations, was permitted to state without objection that he read the guaranty contained in the catalogue to defendant's board, "and offered as evidence that our property was giving satisfaction a recommendation from the Kirkman people" [referring to the written letter of which we have spoken] there was no error. It need not appear that the warranty was the sole inducement for the sale. Even though to some extent he relied upon his own judgment or the statements of others, he may, nevertheless, rely upon a warranty, if that were one of the inducements to the sale. *Forcheimer v. Stewart*, 65 Iowa, 593; *Powell v. Chittick*, 89 Iowa, 513. As the witness who made the sale for plaintiff admitted the making of some kind of a warranty and simply produced the letter of recommendation as evidence that plaintiff's phones were giving satisfaction, there was no prejudicial error in excluding the letter itself. In no event could it have had any relevancy, save as it bore upon the question of defendant's reliance upon the warranty, and as to this plaintiff admitted that some kind of warranty was given to be relied upon by defendant's agents, and the only question was the nature and extent of that warranty. The trial court instructed the jury that it must find that defendant's agents relied upon the warranty to make it binding upon the parties. The record is such that no prejudice resulted from the exclusion of the letter.

Plaintiff asked that it be permitted to make tests of the phones in the presence of the jury under conditions which it claimed closely assimilated those existing where the

phones were to be used by defendant, but the court would not permit it. The universal rule is that it is within the discretion of the court to permit such experiments in the presence of the jury. Such real or demonstrative evidence should not be permitted, unless the conditions are substantially similar, and this is a matter for the determination of the trial court. With its discretion and judgment thereon appellate courts rarely interfere. Elliott on Evidence, section 1252; *Ulrich v. People*, 39 Mich. 245; *Lake Co. v. Wugg*, 132 Ind. 168 (31 N. E. 564). Other rulings on the admission and rejection of testimony need not be considered, as they were either correct or clearly without prejudice to appellant.

III. Defendants tested but fifty-two of the one hundred and four phones shipped it, and found each of these, as it claims, worthless. It never opened or tested the remaining fifty-two phones, and plaintiff claims that the contract was severable, and that under any theory of the case it was entitled to recover the purchase price of the fifty-two phones which were not tested. It asked an instruction to this effect which was refused. In lieu thereof the trial court gave the following instructions: "34. It appears from the evidence that the phones ordered under the contract in question in this case were to be used in extending the lines of the defendant company, and it appears from the evidence that uniformity was desirable in the instruments to be thus installed. Under such facts and circumstances as are shown in the evidence in this case, the defendant company had the right to reject the entire number called for in the order without installation or test of the remaining phones, if the fifty-two phones installed and tested were rightfully rejected under the rules given you in this case."

This ruling presents the only debatable question in the case. On its face the order for the phones was severable, and the failure of one or more less than the whole to com-

9. DEMONSTRATIVE
EVIDENCE: dis-
cretion.

10. SALES: breach
of warranty:
rescission.

ply with an ordinary warranty would not justify an entire rescission of the contract. *Dibol v. Minott*, 9 Iowa, 403; *Spear v. Snyder*, 29 Minn. 463 (13 N. W. 910). The record in this case, however, is peculiar. Fifty-two of the phones were never unpacked, received, or used by the defendant. Defendant installed fifty-two of those shipped it by plaintiff, and found that they would not work. It then notified plaintiff of the failure of the phones to work, and that it would not install any more until plaintiff remedied the defects in those in place. This was not done, and after waiting a reasonable time for the remedying of the defects, defendant rescinded the sale and offered to return all the phones. It is practically agreed that the phones were all alike and of one make, and according to the contract defendant had the right to rescind in case of breach of warranty. Under these facts there was no error in refusing the instruction and in giving the one asked. The breach of warranty affected the entire consideration, and in view of plaintiff's testimony that the phones were of one make and similar in all respects defendant did all that was required of it when it found that the fifty-two phones which it installed did not comply with the warranty. When plaintiff failed to make the phones already installed work in accord with the warranty after notice of the defects, defendant was not bound under this record to install the other phones to see if they would not work. The phones were purchased for use as a system, and defendant could not be held liable under the evidence for a single phone which might happen to work.

IV. Lastly, it is insisted that the verdict is without support in the evidence, and that there should have been a verdict for plaintiff. This was a jury question, and with its finding we are not disposed to interfere.

The record presents no prejudicial error, and the judgment is *affirmed*.

GEORGE LAPLANT, Apellant, v. THE CITY OF MARSHALL-
TOWN ET AL., Appellees.

134 261
1142 472
1142 473

Judges: DISQUALIFICATION: INTEREST IN SUIT. A judge is not dis-
1 qualified from hearing and deciding a motion to dissolve an
injunction restraining a city from condemning land to protect
its water supply, because he is a taxpayer of the city and in-
directly interested in its supply of water.

Condemnation: INJUNCTION: DISSOLUTION. Generally the action
2 of the trial court in dissolving a temporary injunction will not
be reversed on appeal, where the answer denies the allegations
of the petition which are essential to entitle the plaintiff to
relief; and this is especially true where it is sought to enjoin a
city from condemning land to protect its water supply solely on
the ground that the condemnation proceedings are a sham and
in the interest of private parties, and there is no showing of
damage nor that the matters relied upon can not be urged
in the condemnation proceeding.

Appeal from Marshall District Court.—HON. OBED CAS-
WELL, Judge.

FRIDAY, MAY 10, 1907.

THIS is an action to restrain defendant from proceed-
ing with an *ad quod damnum* action wherein defendant city
was seeking to condemn certain lands belonging to plaintiff
for the protection of its water supply. A temporary writ of
injunction was issued as prayed. Thereafter defendants
answered, and also filed a motion to dissolve the temporary
writ of injunction. This motion was submitted to the court
and sustained, and plaintiff appeals.—*Affirmed.*

Boardman & Lawrence, for appellant.

B. L. Burritt and *C. H. Van Law*, for appellees.

DEEMER, J.—Plaintiff is the owner of a tract of land through which runs the Iowa river which is a nonnavigable stream. Upon this land and across the stream is a dam which has been maintained for many years and was originally used for running a grist mill. The city of Marshalltown located its waterworks plant near this dam, and it purchased a lot from the then owner of the dam in order that it might avail itself of the water supply created thereby, and in pursuance thereof erected its pumping station, dug its filter galleries, and constructed other equipment for the purpose of supplying the city with water. In February of the year 1905 plaintiff became the owner of this property by purchase for the purpose of destroying the dam, claiming that the water obstructed by it damaged lands owned by him and others further up the stream. When plaintiff's purpose became known, defendant city brought an action to restrain him from destroying or removing the dam. A similar action was brought by the Marshall Ice Company. See *Marshall Ice Co. v. Laplant* (Iowa), 111 N. W. 1016. In the month of October, 1905, the defendant city for the avowed purpose of preserving, continuing, protecting, and maintaining its source of water supply, instituted condemnation proceedings against plaintiff for the purpose of securing a right to maintain the dam and protect its source of water supply. A sheriff's jury was selected, and notice had been given plaintiff fixing the time and place where it would meet to assess and fix the damages to which plaintiff was entitled. Thereupon plaintiff commenced this action to restrain the city and sheriff's jury from acting further in the premises. A temporary writ was issued without notice, and at the convening of the district court for its next term defendants answered and also filed a motion to dissolve the temporary writ of injunction. Before the motion to dissolve was submitted plaintiff filed objections to the judge before whom it was pending, upon the ground that he was interested in the proceedings, and also a motion to postpone the hearing

for two weeks on account of his (plaintiff's) absence. Both objections and motion were overruled and exception taken. The motion to dissolve was then submitted and sustained, and upon application to one of the judges of this court a restraining order was issued in support of our appellate jurisdiction, which is still in force.

As grounds for the issuance of the temporary writ of injunction, plaintiff alleged that the condemnation proceedings were a sham and a pretense; that the dam was not necessary to the operation of the city waterworks system; that the condemnation proceedings were instituted by the water committee of the city council without authority from the city; that this committee was acting for and on behalf of certain private individuals, and that it was not seeking to condemn the land for public uses; that the use of the dam for water-power purposes had been abandoned; and that plaintiff for the protection of his lands further up the river had the right to destroy the dam. Defendant denied all allegations of the petition, save that it had instituted the condemnation proceedings for the purpose of maintaining a reservoir and source of water supply. Both petition and answer were duly verified.

Before going to the main point at issue, we shall dispose of the claim that the judge who dissolved the writ was disqualified. The judge was a citizen and a taxpayer of the

1. JUDGES: dis-qualification: interest in suit.

city of Marshalltown, and it is claimed that on this account he was not qualified to act upon the motion. It is quite uniformly held that a judge is not disqualified because he may be a taxpayer of a public corporation which had a suit pending before him; nor is he disqualified because of being indirectly interested in the city's having a sufficient water supply. Of the many cases which might be cited upon these propositions we refer to the following: *Commonwealth v. Emery*, 11 Cush. (Mass.) 406; *Ex parte Guerrero*, 69 Cal. 88 (10 Pac. 261); *Justices v. Fennemore*, 1 N. J. Law, 293;

Foreman v. Marianna, 43 Ark. 324; *City v. Peacock*, 89 Tex. 58 (33 S. W. 220); *Los Angeles v. Pomeroy*, 133 Cal. 529 (65 Pac. 1049); *In re Ryers*, 72 N. Y. 1 (28 Am. Rep. 88). No point is made in argument upon the denial of the motion to postpone the hearing; hence, we give that matter no further consideration.

II. Appellant's main contention is that the injunction should not have been dissolved for the reason, first, that the condemnation proceedings were a sham and a pretense, in that they were instituted for the benefit of private persons, to wit, the Marshall Ice Company. This is squarely denied in the answer, which was made under oath, and it is distinctly stated that they were commenced to sustain and maintain the city's source of water supply. It is doubtless true that, if there be a fraudulent pretense that land is to be condemned for a lawful purpose when it is not, an injunction will lie to restrain the proceedings. *Forbes v. Delashmutt*, 68 Iowa, 165. That case was determined upon a demurrer which admitted the facts pleaded. This clearly distinguishes it from the instant one where the allegations of fraud are squarely denied. It is a general rule that, where the answer denies the averments of the petition which are essential to entitle plaintiff to an injunction, the action of a trial court in dissolving a temporary writ of injunction will not be reversed on appeal. *Clark v. Am. Coal Co.*, 86 Iowa, 451. The matter of continuing or dissolving a temporary writ of injunction when there has been an answer filed denying the allegations of the petition rests largely in the discretion of the trial court. *Walker v. Stone*, 70 Iowa, 103; *Schricker v. Field*, 9 Iowa, 366; *Clark v. Am. Coal Co.*, *supra*; *B., C. R. & N. R. R. v. Dey*, 82 Iowa, 312. Generally speaking, a petition will not lie to enjoin proceedings for condemnation for the reason that the mere taking of such proceedings does no injury to property, and for the further reason that the grounds relied upon for an injunction may

2. CONDEMNATION: injunction: dissolution.

be urged in defense to the proceedings. *Lewis on Em. Domain*, section 646; *Doughty v. Somerville*, 7 N. J. Eq. 51; *Williams v. Elting Co.*, 33 Conn. 353; *Dunham v. Hyde Park*, 75 Ill. 371. See, also, *Waterloo Co. v. Hoxie*, 89 Iowa, 317, and *C., B. & Q. R. R. v. Ft. M. & D. M. R. R.*, 91 Iowa, 16, which are more or less in point.

It will be observed that there is no claim that the city had no power to condemn for the purpose of protecting or maintaining its water supply. The contention is that it was not instituting the proceedings for that purpose, and, as that allegation is denied, the case was addressed peculiarly to the sound discretion of the trial court. There had been no entry upon plaintiff's land, and no damages had yet been done his property, and there was no showing as to why he could not present all matters now relied upon by him to the sheriff's jury or to the district court on appeal. He has not yet been injured, nor is there any threat of trespass upon his property. *Bennett v. City of Marion*, 106 Iowa, 628, throws some light upon the proposition here involved, and is an authority for the views already announced. See, also, *Phillips v. Watson*, 63 Iowa, 28; *Waterloo Co. v. Hoxie*, 89 Iowa, 317; *Rockwell v. Bowers*, 88 Iowa, 88. As appellant relies chiefly upon the *Forbes* case, *supra*, we may further say of that case that not only were the facts alleged in the petition admitted by the demurrer, but it was also alleged that defendant railroad company was about to enter upon and occupy the land, and the injunction was sought not to restrain the condemnation proceedings, but to prevent the railway corporation from trespassing upon the property. These facts clearly distinguish that case from the present one. Even were it charged that defendant city had no power to condemn land for the objects proposed by it, that question could be settled in the condemnation proceedings. See cases hitherto cited. This being true, an action in equity will not lie to restrain those proceedings. But the law certainly authorizes the city to condemn lands to pro-

tect, maintain, and continue its water supply. See section 722 of the Code of 1897. Whether or not it may under such proceedings maintain a dam or might have done so when the action was commenced we have no occasion now to determine. That question may be settled in proper proceedings when such work is assumed or undertaken pursuant to the condemnation of the land.

It is further contended that matters should be kept in *statu quo* until plaintiff's case may be heard upon its merits. In so far as this record shows, they will be so kept. It seems that various injunctions have been sued out with reference to the maintenance of the dam, and defendants herein are now seeking to condemn the property for the purpose of maintaining its source of water supply. In so far as shown, it has no purpose to do more than condemn the property in its present condition. Should it attempt to do more than it will be authorized to do after condemning and paying for the land, plaintiff may then have his remedy, but until that time comes he has not been injured, nor will the dam be changed until defendant city secures some right or threatens to make some changes in the dam. No reason is suggested why the *status quo* will not be preserved, even though the city proceeds with its condemnation proceedings.

The trial court did not abuse its discretion in dissolving the temporary writ, and the restraining order heretofore issued out of this court is hereby set aside and dissolved.

The order of the trial court must, and it is, *affirmed*.

J. W. BRICKLEY, Appellant, v. LOUIS WESTPHAL, Appellee.

Counties: RECORD OF BOARD OF SUPERVISORS: AMENDMENT. A board of supervisors after the lapse of four years, has no power to change or amend its record of the canvass of a statement of consent to the sale of intoxicating liquors, so as to make it

show a finding that a majority of the voters of a certain township had signed the petition, where the original record contained no such finding, nor any statistics from which the board could have found such fact.

Appeal from Jones District Court.—HON. B. H. MILLER,
Judge.

FRIDAY, MAY 10, 1907.

ACTION in equity to enjoin an alleged liquor nuisance. Injunction denied and plaintiff appeals.—*Reversed and remanded.*

Chas. W. Kepler & Son, for appellant.

Park Chamberlain and Jamison & Smyth, for appellee.

WEAVER, C. J.—The incorporated town of Olin is situated in the township of Rome, Jones county, Iowa; said township and incorporated town constituting a single election precinct. In the year 1898 a petition or statement of general consent for the sale of intoxicating liquors in Jones county was presented to the board of supervisors, who canvassed the same at their December, 1898, session. Of this canvass a record was made in the minutes of the proceedings of the board, setting forth that the statement of consent was found to be signed by 68 per cent. of the legal voters of the county who voted at the last preceding election. Said record further sets forth the number of voters in each election precinct and the number of such voters from each precinct signing the statement of consent. In this list the township of Rome is credited with 397 voters, of whom the board found 226 had signed the statement, but no attempt was made to distinguish between the voters of said township residing within the corporate limits of Olin and those residing outside, nor was any mention made of said town of Olin or of the proportion of its voters who signed said

statement. The record of the canvass of the statement concludes with the following resolution:

Resolved, that after a full and thorough canvass of the petitions of consent for the mulct law which have been filed herein, this board finds that more than 65 per cent. of the persons who voted at the last general election in this county have signed said petitions, and that the law in connection therewith has been complied with. It is therefore ordered that the prayer of the petition be granted. Yeas and nays being called for resulted as follows: Yeas, 5; nays, none.

This record remained unchanged for something over four years, when at the January, 1903, session of the board of supervisors, action was taken and an additional record made, as shown by the following entry, which, as it furnishes the one subject of controversy in this case, we quote in full:

BOOK G, 325, PROCEEDINGS OF BOARD.

Regular meeting of the board of supervisors of Jones county, Iowa, January session, 1903. The question of the record of the board of supervisors for their regular session, A. D. 1898, in respect to the petition of general consent for the sale of intoxicating liquors under the mulct law, filed with the county auditor by the legal voters of Jones county, Iowa, who voted at the general election in November, A. D. 1898, failing to show all the findings and conclusions of the board which had been done at said November session, A. D. 1898, having been called to the attention of the board, the following proceedings were thereupon had:

Whereas, at the regular session (November) of the board of supervisors of Jones county, Iowa, A. D. 1898, a canvass of the said petition of general consent heretofore filed with the county auditor of Jones county, Iowa, of the voters who had voted at the November election, A. D. 1898, was made by the board of supervisors on the 9th day of December, 1898, it being still the November session and a partial record was then and there made on the result of said canvass as found by the board of supervisors; and whereas, the board of supervisors, on account of the failure of the attorneys who drafted the record to incorporate in said record all the

material findings and conclusions of the board in regard to said petition, did not make of record all the material findings and conclusions of said board of supervisors, at said session in respect to said petition; and whereas, it was found at the hearing of said petition at the November session, A. D. 1898, by satisfactory evidence, also from facts known to said board and other facts appearing of record that a majority of the voters of the incorporated town of Oxford Junction, Iowa, and also a majority of the voters of the township of Oxford including the town of Oxford Junction who voted at the November election, A. D. 1898, as shown by the poll books in said election, signed the said petition of general consent, and also that a majority of the voters of the township of Rome including the incorporated town of Olin, and a majority of the voters of the incorporated town of Olin who voted at the November election, 1898, as shown by the poll books of said election, did sign the said petition of general consent, but, by the mistake of the attorneys who prepared the record of the findings of said board, the majority as to said town of Olin and Oxford Junction and township of Oxford and Rome were omitted from the record:

Therefore the clerk of the board of supervisors, to wit, the county auditor of Jones county, Iowa, is hereby directed by the board of supervisors on this 7th day of January, A. D. 1903, it being of the regular session of the board of supervisors for January, A. D. 1903, to enter the findings of the board of supervisors so made at the November session, A. D. 1898, as follows: The board of supervisors finds that a majority of the legal voters who voted at the general election A. D. 1898, in the township of Oxford, including the incorporated town of Oxford Junction, signed the petition of general consent to the sale of intoxicating liquors, and a majority of the legal voters at the general election, A. D. 1898, residing within the incorporated town of Oxford Junction signed the petition of general consent to the sale of intoxicating liquors, and that a majority of the legal voters who voted at the general election, A. D. 1898, in the township of Rome, including the incorporated town of Olin, signed the petition of general consent, for the sale of intoxicating liquors, and a majority of the legal voters who voted at the general election, A. D. 1898, residing within the incorporated town of Olin, signed the petition

of general consent for the sale of intoxicating liquors. It is further ordered by the board of supervisors that the clerk of the board of supervisors, to wit, the county auditor, be and he is hereby directed to spread upon the records and enter of record as a part of the findings of the board of supervisors of Jones county, Iowa, at their regular session of November, A. D. 1898, all the foregoing, including the preamble, and as a part of the record and proceedings of the board of supervisors made and entered in respect to the petition of general consent for the sale of intoxicating liquors, in Jones county, Iowa, on the 9th day of December, A. D. 1898, the same not having been incorporated in the record thereof.

Motion by Sutherland that the board proceed to ballot on the question of correcting the records of the aforesaid November session of the board of supervisors in 1898, as prayed in the petition. Motion carried. The ballot resulted as follows: Yeas, 3; nays, 2. .

It is conceded that at the commencement of this action the defendant was engaged in keeping a liquor saloon in the town of Olin, and the question whether he is liable to be enjoined as prayed depends solely and entirely upon whether he is protected by the provisions of the mulct law, and this, in turn, depends upon whether the record of the board of supervisors constitutes a sufficient showing that a majority of the legal voters of the town of Olin appeared as signers of the statement of consent. We do not understand counsel for appellee to deny appellant's proposition that the record as it stood prior to January, 1903, was insufficient to protect any person engaging in the sale of intoxicating liquors in said town. Nor could such contention well be urged. By Code, section 2449, it is provided that, in order for the bar of the mulct statute to become effective in a town of less than five thousand inhabitants, the statement of consent must be signed by 65 per cent. of the voters of the entire county voting at the last preceding general election (outside of cities of more than five thousand inhabitants), a majority of the voters of the township which in-

cludes the town, and a majority of the voters within the town itself.

The canvass made by the board of supervisors in December, 1898, would seem to indicate the required 65 per cent. of the voters of Jones county and a majority of the voters of Rome township, but contains no statement of any finding that such petition was signed by a majority of the voters in the town of Olin, nor does it show or find any statistics or facts from which the board ought to or could have made such a finding. It must be admitted, therefore, and we understand it is conceded by the appellee, that the decree of the district court must be affirmed, if at all, on the theory that the board of supervisors acted within its proper jurisdiction and authority in making the order and record which we have quoted from the proceedings of its January, 1903, session, and that said record is to have the same force and effect as if made at the December, 1898, session. This position is sought to be justified on the assumption that in passing upon the sufficiency of the statement of consent the board was acting in the capacity of a court, and as such it had the right to correct its records by an order entered *nunc pro tunc*, and that such is, in fact, the effect of the entry made at the January session, 1903. Counsel say they do not claim any power in the board to reopen the canvass or to recanvass the vote, but they insist upon the power, even after the passage of years and when the membership of the board has been partly or wholly changed, to correct or change a record of its proceedings in the manner here attempted. Of the general power of the board within more or less well-defined limits to correct its record there need be no dispute, but it seems hardly necessary to add that, where the power exists, it must be exercised within some reasonable limit of time. *City of Covington v. Ludlow*, 1 Metc. (Ky.) 295.

Moreover, it ought to be, and we think it is, the rule that when a record has once been made of a finding which

adjudicates a fact directly affecting a public or private right, and especially where such finding is one from which a right of appeal exists to some other tribunal, the record thereof cannot afterwards be materially changed or amended either on the board's own motion or upon the *ex parte* application of one of the parties affected thereby. If there be any authority to the contrary, it has not been cited to us and we have failed to find it. Would it be contended that by an order correcting the record of a proceeding entered years before, the board of supervisors may, upon its own motion or upon the *ex parte* application of one of the parties in interest, materially affect the location of a highway, or the boundaries of a drainage district, or an award of damages? But why may it not be done if the decree of the district court in this case is to be affirmed? The persons seeking the protection of the mulct law, in avoidance of the penalties prescribed by the prohibitory law, are not the only persons interested in the proceedings. The statute carefully preserves to any citizen of the county the right of appeal from a finding of the board upholding the sufficiency of a statement of consent. In a fair sense of the word, we may say the statute makes every individual citizen of the county a party to the proceedings, and, when the board has declared its finding and entered its judgment or conclusion therein, such citizen has a right to rely upon it as final. The board obtains jurisdiction to canvass the statement only by a notice given to the public (Code, section 2450), and at such hearing any citizen may appear and contest the sufficiency of the consent. This right would be of but little value if after a finding has once been entered the board, without notice or opportunity for protest by the people, may at a subsequent meeting nullify the effect of the record which has been made.

It is easily conceivable, in such a case as this, that, if the board had made a finding which legalized or protected the liquor traffic in Olin, some one or more citizens of that

town would have appealed therefrom and contested the showing in its support, while, in the absence of such finding, they would be content with the record as made. If then, four years after the record is made and after the membership of the board has been changed in whole or in part, and after the auditor who made the record has retired from office, the board may proceed under the claim of correcting a clerical mistake or omission to reverse the legal effect of such record and thereby legalize the liquor traffic in territory where up to that moment it has been admittedly unlawful, the door is opened wide to the fraudulent evasion of the law, and the citizens whose rights have been thus foreclosed are practically without remedy. Accepting for the purposes of the argument the appellee's contention that the board of supervisors acts in a judicial capacity in canvassing a statement of consent and, like a court, may amend its records, the closer we draw the likeness or analogy the less justifiable do we find the order now under consideration. It goes without saying that no court will undertake to amend its record in a material respect without due notice to all parties affected thereby.

Moreover, generally speaking, orders amending a record *nunc pro tunc* are entered only for the purpose of correcting some clerical error or omission and they presuppose the existence of some record to be amended. It is not permissible in this manner to enter a judgment or order as of a past date simply because such a judgment or order might properly have been entered at that date. Such order is proper only where the judgment or order or finding was in fact made and declared, but by some mistake or oversight it has not been recorded. In other words, the record must show something to be amended before an order to amend is admissible. Now, the record of the December, 1898, session, as we have already noted, contains no reference whatever to the town of Olin, and shows no act or attempt on part of the board to canvass or classify the voters of Rome

township with reference to their residence within or without the corporate limits of Olin. Therefore, so far as said town is concerned, the entry made at the January, 1903, session was the creation of a new and additional record, and not the correction or amendment of one which had before been imperfectly made. Black on Judgments, sections 115, 131, 132, 135; *Gray v. Brignardello*, 68 U. S. 627 (17 L. Ed. 692); *Doughty v. Meek*, 105 Iowa, 16. The record of the proceedings of the supervisors as recorded in December, 1898, and in January, 1903, bears upon its face the plain evidence that, if any mistake was made in the original entry, it was a mistake of law as to the effect of the findings made, and that nothing was omitted through oversight. It is there disclosed that the form of the entry was prepared by counsel, and, as we may fairly presume, by counsel for the promoters of the petition, and the importance of a good and sufficient record for the protection of their clients called for, and we have no doubt it received at their hands the most careful attention. It is difficult, therefore, to believe that a record thus prepared by able and competent men specially employed for that purpose, with all the facts freshly within their recollection, fails to set forth so material and important a finding by the board, if, in fact, the board did find that the names of a majority of the voters of the town of Olin appeared upon the statement of consent. A record thus made is a much safer reliance than the fallible memory of individuals or the dictum of a board, a part of whose members did not participate in the original hearing, and who must, of necessity, act upon the hearsay statements of others.

It is a significant fact in this connection that the resolution of the board at its December, 1898, session, was adopted by a call of the "Yeas" and "Nays," while the adoption of the amendatory resolution at the January, 1903, session is recorded as having been affected *by ballot*. The alleged mistake of the attorneys who drew the original rec-

ord entry was doubtless discovered by the attorneys who procured its alleged correction and drew the form of the last entry. If that correction is to be upheld, what assurance has any one who is interestd on either side of the question that in another year or five years another board of supervisors and other counsel may not discover some other alleged omission in the amended record by the correction of which the liquor traffic may be forced upon some town from which it is now excluded, or be excluded from some town where it now has a legal existence. We think it unnecessary to pursue the discussion further.

For the reason stated, we hold that the prayer of plaintiff's petition should have been granted. The decree of the district court must be reversed and cause remanded for further proceedings in harmony with this opinion.—*Reversed.*

By agreement of counsel, the decision in the case of *J. W. Brickley v. Hans J. Dreiks*, now pending on appeal in this court from the district court of Jones county, is to follow the result in the case at bar. The judgment of the district court therein is therefore *reversed*, and cause *remanded*.

J. M. DEAN, Appellant, v. H. M. CARPENTER, Administrator of Estate of SEYMOUR BENNETT, Deceased, Appellee.

134	275
142	613

Transactions with decedent: COMPETENCY OF WITNESS. A witness
1 called on behalf of an administrator, in an action to establish a claim against the estate, is competent to testify to transactions leading up to the making of certain deeds by decedent.

Same: DECLARATION OF DECEDENT. Declarations in his own interest
2 made by a decedent in the presence of one seeking to establish a claim against his estate are admissible.

Deeds: CONSIDERATION: PAROL EVIDENCE. It is permissible to show
3 by parol that a deed of property was made by decedent in

consideration for a claim for services which plaintiff is seeking to establish against the estate.

Estoppel. One who accepts the benefits of a contract made in his behalf by another cannot deny the authority of the person making it.

Instructions. Error cannot be predicated on the refusal of the court to give instructions, where no exception was taken to the refusal, where the same so far as announcing correct rules of law are covered by those given, or, where they do not cover the case made by the evidence.

Same: STATING THE ISSUE. In stating the issues the court may copy the pleadings when the same are a clear and concise statement and counsel have agreed thereto.

Appeal from Jones District Court.—HON. W. G. THOMPSON, Judge.

FRIDAY, MAY 10, 1907.

PROCEEDINGS to establish a claim for services against the estate of Seymour Bennett, deceased. Defense, settlement and payment of claim. Trial to a jury, verdict and judgment for defendant, and plaintiff appeals.—*Affirmed.*

W. F. Fitzgerald and *Remley & Remley*, for appellant.

Herrick & Bauder, for appellee.

DEEMER, J.—There is testimony to show that, during the years 1902 and 1903, plaintiff rendered certain services for Seymour Bennett, his father-in-law, since deceased, and that these services were of value. But defendant contends that, whatever these services may have been, they were fully settled and paid for by a deed executed by deceased in December of the year 1903, after all the services had been rendered, to Zula L. Dean, his daughter, and the wife of plaintiff. Plaintiff, while admitting that his wife received a deed for certain lands from the deceased, claims that it was made without consideration, and for the purpose

of defrauding his creditors and his then divorced wife. On these issues, the case was tried, resulting in the verdict above stated. Many points are relied upon for a reversal, to some of which we shall refer during the course of this opinion.

One Luman Bennett is a son of deceased and a brother of the plaintiff's wife, and it seems that, at the time the conveyance was made to Zula Dean, a deed was also made by deceased to him for certain lands. He was called by defendant as a witness to testify to the transactions leading up to the making of the deeds at which plaintiff was present. As the witness was called on behalf of the administrator, he was not incompetent, under section 4604 of the Code. *Leasman v. Nicholson*, 59 Iowa, 260; *Harrow v. Brown*, 76 Iowa, 179.

It is claimed that this witness was permitted to testify, over plaintiff's objection, to certain declarations of the deceased in his own interest that were not made in plaintiff's presence. The record does not bear out this claim. The declarations were made in plaintiff's presence, and under well-known rules were admissible. *Owen v. Christenson*, 106 Iowa, 394; *Cahalan v. Cahalan*, 82 Iowa, 416; *Hamilton v. Mendota Coal Co.*, 120 Iowa, 147.

Moreover, it was permissible for defendant to show by parol evidence the real consideration for the deed to Zula Dean, and that plaintiff's services constituted that consideration. *Logan v. Miller*, 106 Iowa, 511, and cases cited.

Mrs. Dean was called as a witness by plaintiff to show that her husband was not authorized to act for her in the matter of accepting the deed, but she was not permitted to so testify. In this there was no prejudicial error. No one was claiming that he furnished the consideration, and, as she has accepted the deed, she is bound by whatever her husband did and said in procuring it. *Lull v. Bank*, 110 Iowa, 537. There was no prejudicial error in rulings upon the admission and rejection of testimony.

II. Complaint is made of the court's refusal to give certain instructions asked by plaintiff. There are several reasons why there was no error here: First, no exception was entered to the denial of these requests; second, in so far as they announced correct rules of law, the matter was practically covered in the instructions given; and, third, the instructions asked were incorrect, in that they did not cover the case made by the evidence.

It is also contended that in stating the issues the trial court either used or copied the pleadings, instead of stating the issues for itself in clear and concise language. As the pleadings were clear and concise, and stated the exact issues, and as the parties by their counsel agreed that the court should so use the pleadings, there was no error. *De Wulf v. Dix*, 110 Iowa, 554.

Complaint is also made of the instructions given. One related to the effect of Zula Dean's acceptance of the deed upon the authority of her husband, plaintiff herein, to act for her. There was no error in this. It announces a correct rule of law, and, as we have seen, plaintiff was seeking in some way to avoid the effect of the deed by claiming that the plaintiff was not authorized to act for his wife. It was to meet this claim that the instruction was given. There was no error.

The sixth instruction given by the court reads as follows:

As a defense herein, defendant states that some time in December, 1903, the deceased, then in life, requested his son and daughter, sole surviving heirs of deceased, for the purpose and intent of fully disposing of all his property and estate to said son and daughter, and that as requested they met at the time and place named by deceased, that at request of deceased an attorney was also present to draw conveyances necessary to carry out said intention, and that deceased then and there executed the deeds to his son and daughter for the property, and you further find that plaintiff knew of the intention of deceased to so

do for the purpose and with the intent to fully dispose of his property, and thereby avoid administration, and you further find that plaintiff, then knowing the intent and purpose of deceased, accepted the conveyance of the land to his wife, and she, the daughter of the deceased, and one of the two heirs of deceased's estate, you will then be warranted in finding for defendant; but, unless you are so satisfied, you will find for plaintiff on that claim.

This is criticised. It practically states the issue tendered by defendant's answer, which, to be exact, was a plea of estoppel as well as of payment and settlement. But it is said there was no testimony to justify the giving thereof. In this counsel is in error. There is evidence to the effect that these deeds should settle the whole matter, and that they disposed of the entire property then owned by the deceased. The instruction is not as clear as it might be; but, when considered with reference to the testimony, there is no mistaking its meaning.

No prejudicial error appears, and the judgment is *affirmed*.

VESPASIAN WARNER, Appellant, v. MARY HAMILL, GEORGE HAMILL, FRANK L. SMITH, ET AL., Appellees, and DAVIS and ROBERTS, ET AL., Appellants.

Wills: DOWER: ELECTION BY WIDOW. By Code of 1873 a widow

- 1 given a specific bequest of personal property and a life estate in all other property, which included real estate, was not required to make an election but was entitled to take both the specific bequest under the will and a distributive share of the real estate under the statute, there being no provision in the will inconsistent with her dower right; under such circumstances she became seized in fee of a one-third interest in testator's real estate.

Laches. A mere speculator in titles who procures his deeds without consideration and with knowledge that his grantors make no claim to the land conveyed, but have for years recognized the title of another, is bound by their laches and acquires no

interest in the property as against good faith purchasers of an adverse title who had no knowledge or notice of any claim of his grantors.

Same: BURDEN OF PROOF. Where abandonment of title and owner-
3 ship are shown, in a partition proceeding, with equitable circumstances in favor of defendant from which laches may be imputed to plaintiff, the burden of proof rests upon plaintiff to excuse the laches.

Vendor and vendee: NOTICE. Where a vendee of land has knowl-
4 edge of such facts, respecting the abandonment by his grantors of any claim to the land conveyed, as would put a man of ordinary prudence on inquiry he is chargeable with such knowledge as he might thus have gained; and in such cases matters of public record are constructive notice.

Laches: CONTINUANCE AS AGAINST MINOR HEIR. Where laches has
5 run against an ancestor it continues against a minor heir the same as the statute of limitations.

Contracts for sale of land: RESCISSION. Where a purchaser of
6 land on contract accepts the title after an examination of the abstract furnished, agreeing to take the land and pay therefor on the strength of the title as disclosed by the abstract, he cannot thereafter rescind and recover back the purchase money on the strength of imperfections in the title existing at that time.

Appeal from Clay District Court.—HON. W. B. QUARTON,
Judge.

FRIDAY, MAY 17, 1907.

ACTION for the partition of real property. There was a decree dismissing the plaintiff's petition, and he appeals. An appeal was also taken by other parties to the action.
—*Affirmed.*

Birdsall & Birdsall, F. H. Hellsell, John Hamill, and G. H. Martin, for appellants.

F. F. Faville, R. S. Ludington, and James De Land, for appellees.

SHERWIN, J.—It is conceded by all the parties interested in the event of this suit that prior to 1889 one James Brewer was the owner of the land in controversy, and that they all claim through him as the common source of title to said land. On March 28, 1889, James Brewer died testate in Iowa county, State of Wisconsin, seised of said land, leaving no lawful issue and leaving surviving him his widow, Grace Brewer. His will was duly admitted to probate in Iowa county, Wis., on May 7, 1889, and in Clay county, Iowa, it was admitted as a foreign will on May 7, 1895. By the ninth item of his will James Brewer gave \$1,000 to his wife, Grace Brewer, “for her own use and benefit as she may see fit to use it.” The only other provision of the will affecting the widow so far as the land in question is concerned is found in item No. 11 of the will which provides: “All the rest, residue and remainder of all my estate both real and personal wherever situated, I give, devise and bequeath the rents, use and profits thereof unto my wife, Grace Brewer, so long as she may live, and at her, my wife’s decease, I give and bequeath all of said estate, both real and personal, unto my nephew, James Brewer, to have and hold the same unto his heirs and assigns forever from and after the decease of my said wife, Grace Brewer. The life interest in said estate herein given unto my wife is for her own use and benefit.”

Grace Brewer died testate in February 1892, and her will was admitted to probate in Iowa county, Wis., April 12, 1892, and on February 20, 1905, it was admitted to probate as a foreign will in Clay county, Iowa. By the will of Grace Brewer, after certain charitable bequests were paid, the residue of her estate was given to eighteen nieces and nephews of her deceased husband. The estate was administered upon immediately after her death and settled within the two years following. Each of the legatees named herein received a little over \$117 in full payment of their share of the estate of Grace Brewer, and they filed receipts to that effect. The

James Brewer referred to in item 11 of the will of James Brewer, and whom we shall hereafter designate as James Brewer, Jr., was the executor of the will, and after the death of the testator his widow, Grace Brewer, made her home with the James Brewer named in the will until her death. During her lifetime she accompanied James Brewer, Jr., to Iowa and inspected the land owned by her deceased husband, and until her death she received all the rents and profits arising from this land. Immediately after the death of Grace Brewer James Brewer, Jr., took possession of the land, rented and improved it, mortgaged it and paid all taxes thereon, and in April, 1898, conveyed the same by warranty deed, and it is through such conveyance that Frank L. Smith, one of the defendants herein, acquired title to the land subject to certain mortgages to the German Savings Bank of Davenport, Iowa. All of the conveyances after that of James Brewer, Jr., were by full warranty deed, subject only to the mortgages which we have already mentioned, and the several grantors had the actual possession of the land, paid taxes on the same while they held the title thereto, and made permanent and lasting improvements thereon. At the time of the death of Grace Brewer, the value of the land was from \$8 to \$10 per acre, and at the time of the trial of this case below its value was from \$55 to \$60 per acre. The several grantors purchased without any notice of any adverse claim on the part of Grace Brewer's legatees, and all of them paid full value after having the title examined and approved by their attorneys. In June, 1902, the defendant Frank L. Smith entered into a contract with Frank A. Davis and T. L. Roberts, defendants herein, for the sale of the land in controversy at an agreed price; Davis and Roberts agreeing to take the land subject to the mortgages to the German Savings Bank. In this contract there was a provision that Smith was to furnish an abstract showing good and merchantable title on or before February 1, 1903. The abstract was so furnished, and, some objections being made

thereto, the same was corrected and completed by Smith, and the abstract resubmitted to Davis and Roberts, who thereupon wrote Smith that the abstract had been passed upon by their attorneys and found to be all right, and that they accepted the same. The time for the performance of this contract was extended from time to time upon the application of Davis and Roberts, and because of their inability to meet the payments required thereby until in December, 1904, when Davis and Roberts, still finding themselves unable to comply with the terms of the contract, wrote to Smith, asking him to grant another extension of time, to which Smith replied that he was unable to do so. Thereupon Davis and Roberts entered into negotiations with Vespasian Warner, the plaintiff herein, to secure a loan from him to meet the payments called for by the Smith contract, and advising Warner of the terms and conditions of the contract and of the position they were in. Warner, after examining the abstract and the contract, and taking an assignment of the contract, applied to Smith for additional time in which to make the payments called for thereby, to which Smith replied that he could not extend the time beyond March 1, 1905. Thereafter, and before this suit was brought Warner obtained quitclaim deeds from fifteen of the legatees of Grace Brewer, quitclaiming to him any interest which they might have in the land in controversy, and soon thereafter Warner commenced this action in partition, claiming fifteen fifty-fourths of the land under these deeds. The defendant Smith resists this claim, and asks to have his title quieted to the entire tract of land as against the plaintiff and some intervening legatees of Grace Brewer, and as against Davis and Roberts. Smith filed a cross-petition, asking that the contract be declared forfeited. Davis and Roberts, as against Smith, ask that the contract be rescinded because of Smith's inability to pass the full title to them, and that Smith be required to return to them the money they have paid under the contract. Some of the legatees under the will of Grace Brewer, who deeded to War-

ner, answered, asking that the conveyances from them to Warner be set aside, on the ground that they were obtained by fraud, and claiming that Warner holds whatever title he acquired from them for the benefit of the true owner of the land. The trial court found that the plaintiff was not entitled to the relief asked, that he acquired no title by the deeds in question, and quieted the title to the premises in controversy in Smith as against the claims of Warner and the intervening legatees. As between Smith and Davis and Roberts, it was decreed that, unless said Davis and Roberts should pay the balance due on said contract on or before the 15th day of February, 1906, the contract should stand for feited, and all rights of Davis and Roberts thereunder should cease and determine. From this decree the plaintiff, and Davis and Roberts, and the interest represented by the three legatees of Grace Brewer who did not deed to Warner, prosecute this appeal.

The legal proposition presented as between the plaintiff, Warner, and the appellee Smith, and those representing interests identical with his, is whether Grace Brewer was entitled to her statutory interest in the land in question upon the death of her husband, James Brewer, notwithstanding the provisions of his will, and the fact that she accepted the benefits provided by the will. The appellants contend that at the time of her decease Grace Brewer was seised of a dower interest or distributive share of the real estate in controversy, and the appellee Smith contests this proposition. Some legal propositions advanced by the appellants are not controverted by the appellees. The appellees admit that Grace Brewer acquired the title to an undivided one-third interest to the land in controversy immediately upon the death of her husband, James Brewer, unless the record in the case shows that she made an election, which is legal and binding, to accept the provisions made for her in the will of her husband in lieu of such interests in the real estate in controversy. The appellees also

1. WILLS: dower:
election by
widow.

admit the rule that the *lex rei sitæ* controls the title and disposition of real estate. They make no question that the laws of this State as they were in 1889, when James Brewer died, must control the question of the descent and distribution of the real estate owned by him in this State. The question is thus narrowed down to the proposition whether, under the laws of this State, Grace Brewer was required to make an election as to whether she would take under the provisions of the will or renounce such provision, and take what the statute gave her. Section 2440 of the Code of 1873 provided that one-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife has made no relinquishment of her right, shall be set apart as her property in fee simple, if she survive him. And section 2452 of the Code of 1873 provides as follows: "The widow's share cannot be affected by any will of her husband unless she consents thereto within six months after notice to her of the provisions of the will by the other parties interested in the estate, which consent shall be entered on the proper records of the circuit court." Construing the last section noted, we have held that in order to estop the widow from claiming under the statute, notwithstanding the terms of the will, there must be a strict compliance with the requirement of the statute. *Bailey v. Hughes*, 115 Iowa, 304; *Byerly v. Sherman*, 126 Iowa, 447.

It is well settled by authority in this State that the widow cannot be put to an election by the will of the husband, unless the intention to deprive her of dower is expressly stated, or is plainly manifest from the provisions of the will. A will devising a life estate does not cut off dower, even though the widow remain in possession, during her life. *Herr v. Herr*, 90 Iowa, 538. In that case it is said, "it has long been the settled rule in this State that, when there is no express declaration in the will barring the dower of the wife,

the intention that it shall be barred must be deduced by clear and manifest implication, founded on the fact that the claim of dower would be inconsistent with the will or be so repugnant thereto as to defeat other provisions of the will." In *Daugherty v. Daugherty*, 69 Iowa, 677, the testator gave to his wife all of his personal property and certain real estate absolutely. He also gave her a life estate in certain land, with remainder in his son. The widow claimed the property given her by the will, and also claimed her dower interest in the lands devised to the son. It was held that she was entitled to the estate given to her absolutely by the will and to her one-third statutory interest in the land devised to the son; and in that case it was assumed that the widow had accepted under the will. We have held in many cases that, where a life estate is given to the widow by will with the fee to her children at her death, she takes her statutory interest which descends to her heirs upon her decease. *Bare v Bare*, 91 Iowa, 143; *Bently v Bently*, 112 Iowa, 625; *Watson v. Watson*, 98 Iowa, 132; *In re estate of Frank*, 97 Iowa, 704. In the last case cited it is said that a devise by a testator to his widow, when accepted by her, does not defeat her right to dower, unless the intention of the testator that such devise shall be in lieu of dower is shown by a declaration in the will to that effect or is clearly deducible from its terms, as where it appears that a claim for dower would be incompatible with the will, and that to allow it would defeat some provision of the will.

In this case there is absolutely no provision of the will of James Brewer that will be defeated by the allowance of dower to his widow. There is no declaration in the will to the effect that the bequests therein to the wife are to be in lieu of her dower. The legacy of \$1,000 given to her by the ninth item of the will cannot be construed as indicating an intention on the part of the testator to deprive her of her dower right; and hence it is not inconsistent with her claim under the statute. We are therefore of the opinion that there was

nothing in the will of James Brewer requiring his widow to make an election, and, such being the case, she was entitled to take under the will and under the statute, whether she made any election or not.

The appellees concede the correctness of the rule above stated, but they do not concede that an election was not necessary under such rule. In support of their contention, they rely upon an Iowa case, *In re Will of Foster*, 76 Iowa, 364. It must be conceded that said case furnishes some ground for the appellee's contention, but there the controversy related solely to personal property, and it was held simply that, where the will gave the widow a life estate in all of the personalty, it would affect her legal share as contemplated by section 2452 of the Code, and that the widow was subsequently put to an election. The rule there announced has never been extended to cover any will where real estate was involved. On the contrary, we have refused to so extend it, and we do not consider it an authority controlling this case. On this branch of the case, we hold that Grace Brewer, upon the death of her husband, became seised in fee simple of a one-third interest in the land in controversy, and that upon her death it would have descended to her heirs.

The appellees contend, however, and this is one of the issues presented by the pleadings and determined by the trial court, that all of the legatees of Grace Brewer were guilty of such neglect and abandonment of the property and of their right therein as to bar themselves and all parties claiming under them from any relief, because of their laches. It is a familiar principle of equity that the doctrine of laches does not depend for its application upon the statute of limitations, but is applied in analogy thereto. In *Winthrow v. Walker*, 81 Iowa, 651, it is said: "A court of equity will never be called into activity to remedy consequences of laches or neglect or the want of reasonable diligence. . . . It applies the rule of laches according to its own idea of right and justice." And further it is said

2. LACHES.

that "whether the time the negligence has subsisted is sufficient to make it effective is a question to be resolved by the sound discretion of the court." See, also, *Matthews v. Culbertson*, 83 Iowa, 435, and cases therein cited; *Mickel v. Walraven*, 92 Iowa, 430. We are abundantly satisfied that, from the facts in this case, the court should not indulge in overrefinement in applying the doctrine of laches to defeat the plaintiff's recovery. He procured the deeds on which he bases his title without consideration, and with the fullest knowledge of all the facts and circumstances controlling the situation of the parties. He knew that the grantors in his deeds were not making any claims to the land in controversy. He knew that these grantors had been aware of the claims of James Brewer, Jr., ever since the death of Grace Brewer, and he is charged with all of the equities which would exist between his grantors and those claiming under James Brewer, Jr. If his grantors would be held guilty of laches in asserting their rights, he certainly would be, and, in addition to this, he appears before the court in the light of a speculator pure and simple, and not entitled to any special equities.

In a case similar to this in many respects (*Long v. Olson*, 115 Iowa, 388) we said: "Demands founded upon speculation in defective titles do not as a rule, appeal to the favor of a court of equity; and where, as in this instance, the enforcement of the demand means the invalidating of a long recognized title in favor of a party holding a mere paper claim, for which he has parted with no adequate or substantial value, nothing but reasons of the most imperative character will justify the granting of such relief." The land in controversy has greatly increased in value since the death of James Brewer. During the period from the death of Grace Brewer the land has been sold several times. It has been conveyed under deeds under which the grantors or their estates are liable. In each transfer the grantee was a good-faith purchaser, parting with a fair and adequate value for the premises, and without any suggestion of any notice or knowledge of claim to

the premises on the part of Grace Brewer's legatees. About thirteen years passed between the time of Grace Brewer's death and the time this action was begun. In the meantime the land had not only been sold and increased in value, as we have seen, but it was mortgaged, and permanent and lasting improvements have been put thereon. All of the taxes that have been assessed against the property for all of these years have been paid by the several owners, and during all of the time no one of the legatees ever visited the land, paid any attention to it, or made any claim to it in any way. All of them either knew of the land or by reason of the circumstances were chargeable with knowledge of it. Many of them knew that it had been sold and mortgaged. They knew that James Brewer, Jr., claimed to be the owner of and was disposing of it, and they swear that they never claimed to have any interest in the land whatever, and did not believe they were conveying any interest to Warner when they executed the deeds to him. Under these circumstances, we think the case brought within the rule of the cases which we shall hereinafter cite, and that the particular situation is aptly described in *Long v. Olson, supra*. The legatees permitted the land to drop from their sight and attention as completely as if it had never existed. They never visited it nor inquired after it. They never paid a dollar of taxes upon it, and they knew that James Brewer and his grantees were in possession, cultivating and improving the land in the belief that it was rightfully theirs. Such neglect and abandonment should constitute such laches as will deny a recovery. *Horr v. French*, 99 Iowa, 73; *Head v. Newcomb*, 89 Iowa, 732; *Hewitt v. Morgan*, 88 Iowa, 468; *Joseph v. Davenport*, 116 Iowa, 274; *Pitts v. Seavey*, 88 Iowa, 343.

Ignorance of the law will not protect a party from the operation of the rule (*Lucas v. Hart*, 5 Iowa, 415), and, where neglect and abandonment are shown with equitable circumstances in favor of the de-

8. SAME: burden
of proof.

fendant from which laches may be imputed to the plaintiff the burden rests upon him to execute such laches. *Hammond v. Hopkins*, 143 U. S. 224 (12 Sup. Ct. 418, 36 L. Ed. 134).

A party is also chargeable with such knowledge as he might have obtained upon inquiry, where he knows facts which would lead a man of ordinary prudence to make such inquiry, and in such cases matters of public record are constructive notice. *Mickel v. Walraven, supra*; *Wood v. Carpenter*, 101 U. S. 141 (25 L. Ed. 807). This rule applies as well to the legatees claiming independently of the plaintiff.

Where laches has started to run against an ancestor, it continues to run against a minor heir the same as the statute of limitations. *Gibson v. Herriott*, 55 Ark. 85 (17 S. W. 589, 29 Am. St. Rep. 25); *Wilson v. Harper*, 25 W. Va. 179; *Buck v. Davis*, 64 Ark. 345 (42 S. W. 534); *Grether v. Clark*, 75 Iowa, 383; *Black v. Ross*, 110 Iowa, 112.

We come now to the controversy between the appellee Smith and the appellants, Davis and Roberts. From the conclusion we have reached on the first point discussed, it is apparent that the title which Smith agreed to convey to Davis and Roberts was defective in the respect we have stated, and, if this were all of the case between Smith and Davis and Roberts, it is quite likely that a conclusion would have to be reached other than the one reached by the trial court; but the record shows that Davis and Roberts accepted the title presented to them after having the same thoroughly investigated by their attorneys, and formally agreed to take the land and pay the purchase price agreed upon on the title shown by the abstract furnished them, and, such being the case, they have never been and are not now in a situation to rescind their contract and recover back their money because of imperfections in Smith's title at that time. Moreover, it is

4. VENDOR AND
VENDEE: NO-
tice.

5. LACHES: con-
tinuance as
against minor
heir.

6. CONTRACTS FOR
SALE OF LAND:
rescission.

shown that these men were actively engaged in attempting to overthrow Smith's title to the land in controversy, and for that reason they are not entitled to any special consideration at the hands of a court of equity. The trial court protected their rights by giving them an opportunity to comply with the terms of their contract, and we think this all that they were or are entitled to. If they shall comply with the order of the trial court within sixty days of the filing of this opinion, they may have conveyance of the land as herein provided, otherwise, their contract will be forfeited.

The appellees filed a motion to tax the appellants a part of the costs of the printing of their abstract. In view of the disposition which we make of the case, it is unnecessary to pass upon this motion.

The judgment is in all respects *affirmed*.

WILLIAM A. MONTGOMERY ET AL., Appellants, v. G. S. GILBERTSON, as Treasurer of the State of Iowa, Appellee.

Inheritance tax: PROPERTY SUBJECT TO. An inheritance tax attached to bequests of personal property to collateral heirs where the estate was still subject to the control of the Probate Court at the time the law became effective, and the same could not be defeated by any unauthorized settlement and distribution, made prior to the filing and approval of the executor's final report, and within the year allowed for filing claims and final settlement.

Appeal from Benton District Court.—HON. G. W. BURNHAM, Judge.

FRIDAY, MAY 17, 1907.

ACTION to enjoin and restrain the defendant, who was the State Treasurer, from collecting an inheritance tax upon certain property which passed to plaintiffs in virtue of the

will of one Thos. Montgomery, who died in Benton county October 3, 1897. The trial court dismissed the petition, and plaintiffs appeal. *Affirmed.*

Tom H. Milner, for appellants.

Chas. W. Mullan, Attorney, and *C. Nichols*, County Attorney, for appellee.

DEEMER, J.—Thos. Montgomery's will was admitted to probate in the Benton county court, November 4, 1897, and the executors thereby appointed,—Wm. A. Montgomery and Luther Fisher were appointed and qualified November 14th of that year. Deceased was a bachelor, and he devised and bequeathed his property to his collateral heirs, who are the plaintiffs herein. All were of age during any time material to our inquiry, save five children of Luther A. Fisher, to wit, Wm. H., Myrtle A., Mary E., Chas. M., and Jessie O. Fisher, and for these Luther A. Fisher was appointed guardian in April of the year 1899. The executors filed an inventory April 25, 1899, with list of heirs, accompanied with a final report; and time for hearing thereon was fixed for May 2, 1899. Four of the legatees under the will waived notice of the final report, and consented that the report be approved. Notice was also given by one publication in a newspaper issued May 5, 1899. Over date of May 2, 1899, all the legatees under the will — Luther Fisher signing as guardian for his wards — acknowledged full payment of all legacies under the will of the deceased, consented to the discharge of the executors, and waived notice of the filing and hearing of final report. Upon May 5th, as we understand it, the probate court made an order approving the final report and discharging the executors. It seems that proof of publication of notice of the appointment of the executors was not made until October 15, 1905. The receipt on the part of the legatees was filed May 4,

1899. The final report of the executors, after showing an inventory filed April 25, 1899, that they published notice of appointment and filed list of heirs, contains this recitation: "(4) That all claims against said estate of every kind and character have been fully paid, said claims being, in fact, only last sickness and funeral expenses of decedent; that executors have heretofore made full and complete distribution of assets of said estate of and to said several legatees named in said last will and testament of decedent, and there now remains nothing further to do in and about the premises, said estate having been fully settled, and more than a year elapsed since publication of notice thereof."

So far as material, the will of the deceased reads as follows:

(2) All the rest, remainder and residue of my estate, real, personal and mixed, of which I die seised or possessed of, or to which I may be entitled, I will, devise and bequeath as follows, to wit:

To my nephew, Wm. A. Montgomery, I bequeath the sum of twelve thousand dollars (\$12,000).

To my niece, Florence Montgomery, I bequeath the sum of twelve thousand dollars (\$12,000).

To my niece Margaret Fisher, wife of Luther Fisher of Jefferson township, Poweshiek county, Iowa, I bequeath the sum of twelve thousand dollars (\$12,000).

To my sister Elizabeth Jones, I bequeath the sum of one thousand dollars (\$1,000).

To my sister-in-law, Mrs. Elizabeth Montgomery, I bequeath the sum of five hundred dollars (\$500).

To the children of Mrs. Luther Fisher, aforesaid, viz., William H., Alice Myrtle, Mary Elsie, Charles Montgomery, and Jessie Olive Fisher, I bequeath each the sum of eight hundred dollars (\$800).

The rest, residue and remainder of my estate of which I may die seised or possessed, I will, devise and bequeath to my nephew, William A. Montgomery, and to my nieces, Florence Montgomery, and Mrs. Luther Fisher, to be divided between them equally, share and share alike.

I hereby appoint my nephew Wm. A. Montgomery and

Mr. Luther Fisher, executors of this last will and testament. Hereby exonerating them and each of them from giving bonds for the performance and discharge of said trust, and I hereby authorize my said executors to sell and dispose of such of my estate as in their judgment may be advisable to raise sufficient means to pay off my debts and legacies named in this will, directing that they do not resort to the real estate until the personal property is first exhausted. I also will and direct that if it becomes necessary to resort to the sale of real estate for the purpose herein named, that my said executors may sell and dispose of any real estate necessary without an order of the court to do so.

Defendant was proceeding to collect an inheritance tax upon the personal property bequeathed by the second paragraph of the will to the collateral heirs, when plaintiffs brought this action to restrain him from so doing, claiming that distribution of the personal estate was made to the legatees under the will on or about November 16, 1897, and that the collateral inheritance tax law did not become valid and enforceable until April 8, 1898, according to the holding of this court in *Ferry v. Campbell*, 110 Iowa, 290; *Herriott v. Potter*, 115 Iowa, 648; *Gilbertson v. Ballard*, 125 Iowa, 420; *Weaver Estate*, 110 Iowa, 331, and other like cases. There is testimony to show that the executors made a distribution of the legacies under the will on or about the time named; they claiming to have paid the legacies to the Fisher children, to their father, who had not then been appointed their guardian. These children were then minors, and had not reached their majority when the executors were discharged. No receipts were given by the legatees until the one was prepared over date of May 2, 1899. Nor was any order of court obtained for the distribution of the estate until the final report was filed and acted upon. The original collateral inheritance tax law was passed by the Twenty-Sixth General Assembly, taking effect July 4, 1896. This was carried into the Code of 1897 as section 1476 *et seq.*, and an amendatory act

providing for notice was passed by the Twenty-Seventh General Assembly known as chapter 37, which went into effect April 8, 1898.

We have already referred to the proceedings of the probate court and of the executors, and, without repeating, it is manifest that the *Weaver case, supra*, does not apply, for there was no law as to inheritance taxes when the testator in that case died. In *Ferry v. Campbell, supra*, we said: "As to the personal estate, the rule seems to be different, however. While the distributive share is a vested interest — that is, vests in point of right at the time of the death of the intestate — yet the persons who take the amount to be received must be ascertained and determined by the probate court. So long as the estate remains unsettled, the Legislature may cure any defects in the law creating a lien thereon, and the act may be made retroactive. The cases heretofore cited so firmly settle this principle that we need do no more than refer to them." It is true that in that case we held the law in certain particulars unconstitutional, but in that and subsequent cases we held that the defect might be cured by subsequent legislation. See *Herriott v. Potter*, 115 Iowa, 650; *Blair v. Ostrander*, 109 Iowa, 204; *In re Rahrer*, 140 U. S. 545 (11 Sup. Ct. 865, 35 L. Ed. 572). In *Ferry v. Campbell, supra*, it is said, in effect, that the original act was dormant, subject to be revived retroactively as to all unsettled estates in so far as personal property was concerned. So long as the estate was subject to the control of the probate court, the Legislature had the right to cure the original inheritance tax acts and make them apply to personal property of an unsettled estate. This is the holding in *Herriott v. Potter, supra*, following *Gelsthorpe v. Furnell*, 20 Mont. 299 (51 Pac. 267, 39 L. R. A. 170). See, also, *Prevost v. Greneaux*, 60 U. S. 1 (15 L. Ed. 572); *Arnaud v. His Executor*, 3 La. 336.

But it is claimed that the property had all been distributed when the amendatory act went into effect. What

is meant, as we understand it, is not that the estate had been settled, for this was not true, but that the legacies had been turned over to the legatees before the act went into effect. While we may concede that this was so, still, as to the money paid the father of the Fisher heirs, there was no authority in the executors to do so, and no binding act was done in this regard until long after the law went into effect. The estate of the deceased was in probate for settlement. The executors had not filed proof of notice of their appointment, had filed no inventory of the estate, in fact had done nothing, so far as the record shows, until April of the year 1899. Was the estate so far unsettled that the State Treasurer had authority to call for the inheritance tax? This is the pivotal question on this branch of the case. Surely the claimed settlement and distribution made by the executors within a few days after their appointment did not deprive the court of jurisdiction over the funds, nor relieve the executors from liability to creditors or others interested in the estate. The payment to the father of the minor legatees was entirely without authority, and manifestly illegal, although not void. So far as the probate court was concerned, it still had jurisdiction over the estate and power to direct the executors as to the settlement thereof. This it did not lose until the final report was made and approved. The executors claim, however, that there were no debts against the estate, save for funeral expenses and medicinal attendance, and that these were paid before they made distribution; but they could not legally know that fact until a year after publication of notice of their appointment. Code 1897, sections 3348, 3349. The probate court had full power over the estate as soon as the will was probated, if not before, and the actions of the executors were subject to its approval and control until their final discharge. No matter what the provisions of the will, the estate was in court for settlement and distribution, and the executors gained their power and authority from the law, and not alone from the provisions of the

will. *Burlington Co. v. Gerlinger*, 111 Iowa, 293; *In re Van Vleck's Estate*, 123 Iowa, 90. See, also, *Shoenberger v. Institution*, 28 Pa. 465.

Our statutes make the following provisions with reference to the payment of legacies:

Sec. 3355. Specific legacies of property may, by the court, be turned over to the legatees at any time upon their giving unquestionable security by bond upon real estate as may be ordered by the court or judge, to restore the property or refund the amount at which it was appraised, if wanted for the payment of debts.

Sec. 3356. Legacies payable in money may be paid on like terms, whenever the executors possess the means which can be thus used without prejudice to the interest of any claim already filed.

Sec. 3357. After the expiration of the twelve months allowed for filing claims, such legacies may be paid without requiring the security provided for in the two preceding sections, if means are retained to pay off all claims proved or pending.

It will be observed that the court never ordered these legacies turned over to the legatees, nor was any security given by them, nor had the 12 months expired from the time of filing claims; so that the alleged distribution was entirely without authority, and in contemplation of law did not take place until approved in May of the year 1899. Appellant says, however, that these statutes refer to specific, and not to general, legacies. Let this be conceded, and, if it be true, there is no authority anywhere to turn over general legacies until the estate is settled, and in no event can this be done until the expiration of the year for filing claims. In contemplation of law, the estate was unsettled when the inheritance tax law became effective, and plaintiffs should pay the inheritance taxes upon the property received by them, which was, as we had already stated, received in contemplation of law not earlier than May 2, 1899.

None of the cases cited by appellants run counter to

these views. Their counsel contend that, as the acts of the executors were not void, no one but a creditor may complain. Let this be conceded *arguendo*, still the State was in a sense a creditor, and had the right to insist that the estate be settled according to law. In contemplation of law, it was unsettled when the inheritance tax law became enforceable, and this is the end of the case.

The decree dismissing the petition is correct, and it is therefore *affirmed*.

CHARLES E. BALL, Appellee, v. G. R. SKINNER, Appellant.

Physicians: NEGLIGENCE: EVIDENCE. Where it was charged that

- 1 defendant negligently applied to plaintiff's limb a caustic substance which burned the flesh, and that he negligently failed to remove the same when his attention was first called to the pain thereby produced, and the evidence warranted a finding that he was not negligent in the first instance but was in not removing the application, he should have been permitted to state when testifying as an expert whether the caustic had spent its force at the time he was called to relieve the pain.

Same: EXAMINATION OF WITNESS. Where a druggist has testified

- 2 concerning a book formula for compounding a solution it is proper to cross-examine him with respect thereto, but this does not authorize placing the contents of the book before the jury on his redirect examination.

Physicians: EVIDENCE NEGATING NEGLIGENCE. A physician charged

- 3 with negligence in using a solution compounded for him by a druggist may show that such druggist was doing a reputable business and holding himself out as a person skilled in his profession; since, if such is the fact, it would not be negligence to use the solution, in the absence of some circumstance which would put the physician on guard.

Evidence: REMARKS OF COURT: PREJUDICE. Where a physician

- 4 charged with negligence in using a certain solution prepared for him by a druggist sought to show that physicians rely generally on druggists for the purity, quality and proper compounding of their drugs and medicines, a remark of the court, in ruling the evidence out, that from his own observation and knowledge of the matter such was not the fact, was prejudicial;

and the error was not cured by subsequently admitting the evidence with a reiteration of the same remark.

Expert evidence: INSTRUCTIONS. As a general rule expert testimony should be given consideration like all other testimony which the court permits to go to the jury, and should be accorded such weight as, in view of all the evidence of every kind and nature and its reasonableness and the apparent candor and competency of the witness, in fairness it demands.

Same. An instruction which permits the jury to pass upon the materiality of a false assumption of facts embraced in a hypothetical question addressed to an expert; to determine whether a false assumption of a material fact is of such a character as to destroy the value of an expert opinion based thereon; and permitting the jury to accord some weight to an opinion based upon an assumption wholly or partially incorrect, is erroneous.

Appeal from Linn District Court.—HON. B. H. MILLER,
Judge.

FRIDAY, MAY 17, 1907.

THE opinion states the case.—*Reversed.*

Henry Rickel and *P. W. Tourtellot*, for appellant.

Grimm, Trewin & Moffit, for appellee.

WEAVER, C. J.—It is the claim of the plaintiff that on April 10, 1900, he suffered an injury to his ankle and employed the defendant, a physician and surgeon for many years at Cedar Rapids, Iowa, to treat it. In the course of such treatment he alleges that the defendant undertook to place a cast upon or about the injured ankle, and in so doing carelessly and negligently made use of a caustic preparation or solution which had the effect to burn and injure the flesh; that later upon the same day, plaintiff experiencing great pain in and about his ankle, he recalled the defendant, who made but a slight examination, and did not remove the cast, but gave the plaintiff an opiate causing him to sleep several hours; and that as a result of this careless and negli-

gent treatment the plaintiff's ankle and foot were so burned and injured that the flesh fell from the bones and tendons, crippling and confining him for many months, and causing him to suffer great pain and to sustain permanent injury to his limb, for all of which he seeks to recover damages. The defendant answers in denial. There was a verdict and judgment for plaintiff in the sum of \$2,500, and defendant appeals.

The evidence, which in most respects is without serious dispute, tends to establish the following facts: The defendant, who is an experienced physician and surgeon, was called upon at his office by the plaintiff, who complained of some injury to his ankle, and desired, if possible, to have it treated in such manner as to permit him to go out upon the street and attend to his business. Defendant told him he could incase the ankle in a tight cast which would not prevent his moving about upon crutches. It appears that for the making of such casts or fixed bandages surgeons sometimes employ a solution of silicate of soda, a preparation commonly known as "liquid glass" or "soluble glass." A plain cloth bandage is first wrapped about the injured member, and over this bandage is placed several thicknesses of other cloths or bandages soaked in the solution, which soon harden into a cast which holds the joint quite rigidly in the desired position. Surgeons do not ordinarily manufacture this solution, or keep it in stock, but rely upon druggists or chemists to furnish it upon call. The defendant, having decided to use a cast of this kind, telephoned to the place of business of one Whelihan, a pharmacist doing business in the city and of whom he was in the habit of purchasing such materials, to send him a quantity of the solution. Whelihan replied that he had none on hand, but could make some, and was told to proceed to do so. The solution is a mixture or compound of soda and silica and water, and when these elements are used in the proper proportion the compound so made may be applied to the skin of a person without injuri-

ous results; but, some of these elements being of a caustic nature, if they are not compounded in the right proportions to neutralize such quality, its application to the skin or flesh is liable to produce serious injury. Whelihan, with his assistant, proceeded to prepare the solution, and when completed sent it to the office of the defendant, who thereupon made use of it in bandaging and fixing the plaintiff's injured ankle. This treatment was concluded about one or two o'clock in the afternoon, after which plaintiff returned home. About six o'clock in the evening plaintiff sent for the defendant, who responded to the call, and, upon complaint of the plaintiff that his foot was paining him, defendant cut the bandage part way down from the top. Upon this being done, plaintiff seemed to be relieved, and defendant left him for the night. On the following morning, the defendant repeated his visit and removed the cast and bandages from the injured limb. It was then revealed that the flesh upon the defendant's foot and ankle had been severely burned and injured, as if by a caustic application. Immediately thereon defendant applied remedies to arrest the injurious results of the application, and continued to attend the plaintiff thereafter for several months, till he was substantially recovered. It is not denied that the injury is one of considerable severity, or that the plaintiff suffered pain and loss of time therefrom, and the question to be settled in this litigation is whether, conceding such injury, the same is properly chargeable to negligence on part of the defendant. It is the claim of the appellant that in the trial of this question in the court below there were several errors entitling him to a reversal of the judgment rendered against him, and to a new trial.

I. Several exceptions are urged to rulings of the trial court upon the introduction of evidence. We cannot take time to consider all these objections in detail, but will refer to the following as presenting questions of materiality and merit: The defendant, being a witness in his own behalf,

and testifying also as an expert surgeon, was speaking with relation to his visit to the plaintiff on the evening after the cast had been placed on the ankle, and was asked the following question:

1. PHYSICIANS:
negligence:
evidence.

"Q. Assuming that this preparation is as caustic as it has been shown to be by its effect upon this man's ankle, I will ask you whether or not the caustic had expended its force and done its damage by the time you got there and cut that down?" Answer to this question was ruled out on objection of the plaintiff as being incompetent, irrelevant, and immaterial. We think the answer should have been allowed. It will be observed, by reference to the appellee's claim, that he charges negligence in two respects: First, in the application of the solution to the plaintiff's ankle; and, second, in failing to discover the difficulty and remove the bandage at the time of the defendant's visit on the evening after the first treatment. Now, if the jury should find, as it well might find under the testimony, that the defendant was not chargeable with negligence in the first treatment, but was negligent in failing to see the character of the application and remove the bandage upon his visit to the plaintiff in the evening, it would be very material to ascertain whether the damage or injury of which complaint is made had already taken place before the defendant's said visit. The question asked by counsel was fairly well calculated to elicit relevant testimony on this point, and it was an error to exclude it.

The druggist Whelihan, testifying for the plaintiff, stated that he compounded the solution according to a formula found in the United States Dispensatory. On cross-examination a colloquy arose between witness and counsel over the fact and witness was asked to look at the book and see if the assumption of counsel was not right. On redirect examination plaintiff's counsel was permitted to read an extended extract from the book, not the formula in question, and ask the witness if he did not find it there. Objection to this

2. SAME: exam-
ination of
witnesses.

question was overruled, and the witness answered in the affirmative. The objection should have been sustained. The witness having first testified concerning the book formula, it was proper to cross-examine him thereon; but such cross-examination did not open the door to plaintiff to place other contents of the book before the jury in support of his case.

The defendant, as a witness in his own behalf, was asked if he knew whether the druggist Whelihan at the time in question was holding himself out and advertising himself

as a manufacturing chemist, and upon objection of the plaintiff, the answer was ruled out.

3. PHYSICIANS:
evidence nega-
tating negli-
gence.

We think the evidence sought by this inquiry was very material. If Whelihan was doing business as a reputable druggist or chemist and holding himself out to the world as a person skilled in such work, then under ordinary circumstances, the defendant would be justified in depending upon his reliability and competency and accepting the solution purchased of him as being what it purported to be; and, in the absence of any circumstance which should have put him on his guard, he would not be chargeable with negligence in using such solution upon the plaintiff's ankle. The matter inquired about had a direct bearing upon the first ground of negligence alleged by the plaintiff and should have been admitted.

II. Complaint is made of certain remarks by the court pending the trial and in the presence of the jury as having a clear tendency to disparage evidence offered by the defend-

4. EVIDENCE: re-
marks of
court: preju-
dice.

ant and to prejudice his defense in the minds of the jury. For instance, objection having been made by plaintiff to certain matter offered in evidence by defendant, the court ruled upon it in the following words: "I don't see where this testimony can do any harm." Again, defendant being asked whether physicians generally rely on the druggist for the purity, quality, and proper compounding of their drugs and medicines, and

objection being made thereto, the court said: "Taking my own observation and knowledge of that matter, I think that most all surgeons and physicians in this country don't, as a rule, rely on ordinary druggists. All physicians that I am acquainted with buy their own remedies, and don't rely on the druggist." And, again, another Cedar Rapids physician, testifying for the defendant was asked substantially the same question, and again, an objection being made, the court interposed as follows: "Do they depend on the druggist? Most of them have their own drugs in our county." Having with this remark sustained the objection, the court thereafter seems to have changed its ruling with the following explanation: "Now, it is proper to show the custom of physicians in Cedar Rapids and vicinity in ordering drugs of a registered pharmacist to rely upon their purity. As I said to you the other day, they might rely upon the skill and all that of the pharmacist. They might rely on that, and would perhaps. I didn't mean to offend the defense when I said that most of our physicians had their own drugs, but the fact is, and the fact remains, that you can't go scarcely to a physician's office I am acquainted with in Cedar Rapids, or any place else, but what you find a pharmacy there. That is the matter I spoke about, and not in any way to influence this jury one way or the other."

Concerning the first incident above mentioned, it may be that the court's remark to the effect that certain evidence admitted could do no harm was not a happy one, yet we do not think it involves reversible error. The objections raised to the other remarks of the court in the presence of the jury are of a much more material character. It will be observed that, in the first instance, when it was sought to show that, in ordinary practice of medicine and surgery, it was the general custom or practice of physicians and surgeons to rely upon druggists for the compounding and preparation of remedies and applications employed or prescribed by them, the judge not only ruled out evidence of the alleged fact on

part of the defendant, but proceeded himself to negative the truth of such contention by stating his own observation and knowledge to the contrary. This ruling and remark, as we understand the record, was never changed or withdrawn.

Later in the course of the trial, when another witness was on the stand, and the same kind of testimony was offered, it was met with a repetition of the same ruling and substantially the same statement by the court. At this time, however, the court seems finally to have concluded to admit the offered evidence, but, while disavowing any intention to offend any of the parties or to improperly influence the jury, proceeded to reassert the truth of his former remarks by the declaration that "the fact remains" that of his personal knowledge the physicians of Cedar Rapids and elsewhere maintain their own pharmacies. In other words, while changing the ruling and admitting the evidence, its value was effectually neutralized by a statement from the bench which, in substance, denied its truth. It is not to be understood from this language that the learned trial judge intended to put the appellant at a disadvantage before the jury; but we are fully persuaded that such must have been the effect of his remarks, and the exceptions taken thereto must be sustained.

III. Both parties introduced and examined expert witnesses on various phases of the controversy and from the very nature of the case the evidence in support of the defense was very largely of that character. To govern the jury in the consideration of expert testimony the court gave the following instructions:

5. EXPERT EVIDENCE: instructions.

Instruction 11. You are not to substitute for your own conclusions, upon the evidence in the case, the opinions of expert witnesses; but it is your duty to determine the issues involved from all the evidence introduced in the case.

Instruction 12. You will carefully consider the expert testimony which has been adduced in the case, and give it the weight you think it justly entitled to, taking into considera-

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tion whether or not the hypothetical questions propounded to the experts are based upon facts established in the case. Such expert evidence should not overthrow positive and direct evidence of creditable witnesses who testified from personal knowledge. You are not bound by the opinions of the experts, but should determine the questions involved in the case from all the evidence, including the evidence of the expert witnesses.

Instruction 13. You are not to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. Upon the contrary, you are to carefully scrutinize the evidence, and from that determine what, if any, of the statements contained in the hypothetical questions, are true, and what, if any, are not true. Should you find from the evidence that some of the material statements contained in such hypothetical questions are not correct, and are not borne out by the evidence, and they are of such a character as to entirely destroy the reliability of opinions based upon the supposed state of facts contained in such questions, you may attach no weight whatever to the opinions based thereon. You are to determine from all the evidence what the real facts are, and whether they are correctly or not stated in the hypothetical question or questions. An opinion based upon a supposed state of facts wholly incorrectly assumed, or incorrect in its material facts, to such an extent as to impair the value of the opinion, is of little or no weight.

Error is assigned upon the giving of these instructions. When read as an experienced lawyer would read it, there is little for the appellant to complain of in the eleventh paragraph. The only criticism which may justly be passed upon it is that the rule of law is stated so briefly and baldly that the average juror may not recognize the implied restrictions and limitations which a lawyer would discover in the terms employed. It is true that the verdict when reached is to reflect the final opinion and conclusion of the jury upon the whole case, and jurors are not to substitute the opinions of witnesses for their own, yet in stating this rule care should be observed to avoid giving them the impression that

they can properly reject evidence simply because it is expert in character, and register their own conclusions without giving it any consideration. In other words, they should be made to clearly understand that their verdict is not to be founded upon their private personal views of the subject abstractly considered, but upon the conclusion to which their minds are brought after a fair consideration of all the evidence, both expert and nonexpert.

In the twelfth paragraph, the statement that the jury should "not allow expert evidence to overthrow positive and direct evidence of creditable witnesses, testifying from personal knowledge," we think cannot be approved. The rule as stated in the instruction is evidently quoted or adopted from expressions made use of by this court in *Borland v. Walrath*, 33 Iowa, 130, and *Whitaker v. Parker*, 42 Iowa, 585. It will be noticed, however, on examination of these cases, that in each of them the question at issue was the genuineness of certain written signatures, and we think it is a fairly well established proposition that, upon the matter of disputed handwriting, expert evidence is subject to special limitations and is accorded less consideration when opposed to the positive evidence of credible witnesses speaking from personal knowledge than is given to evidence of expert witnesses in general. This distinction was recognized by us in *State v. Townsend*, 66 Iowa, 741. In that case expert medical witnesses had testified upon the question of the defendant's soundness of mind, and the trial court instructed the jury thereon in the language employed by this court in the *Borland* case and the *Whitaker* case above cited. We held the instructions erroneous, saying: "In view of the peculiar character of the case, we do not think the medical evidence should be regarded as the lowest order of evidence as the court held. There are cases undoubtedly, in which this might be said of expert evidence. Take a case involving the genuineness of a signature. Expert evidence would be of a low grade as compared with the testimony of credible wit-

nesses who testify to having seen the signature written. There are many cases of a similar kind; but there are other cases, and the case before us is one of them, which we do not think call for a disparagement of expert evidence. There were questions touching the matter of epilepsy which could be answered properly only by an expert witness, and the fact of epilepsy, if established, had such an important bearing upon the question as to the defendant's mental condition, at the time of the homicide, we think that the attempt to grade the evidence was calculated to mislead the jury." See, also, *Brush v. Smith*, 111 Iowa, 220.

Some of the most important questions in the instant case were of a character that only an expert witness could speak with any degree of clearness or certainty, and, as is suggested in the *Townsend* case, we think the parties were entitled to have the same go to the jury without the handicap placed upon it by the instruction to which we have referred. If the instruction had said no more than that the jury was not necessarily bound by opinion evidence as against positive evidence of credible witnesses where the two kinds of evidence were in conflict, no just exception could be taken to it; but the direction of the court was not so limited, and the jury were told in substance, that, where such a conflict arises, the proposition supported by the experts must fail. A little reflection will make it plain, we think, that this ought not to be the rule, and we think the authorities do not sustain it. For instance, in a given case, a witness of unimpeachable character for veracity and candor may testify to an alleged fact or state of facts as having occurred under his personal observation, while against this testimony there may be an unbroken array of scientists, students, and experts of the most eminent rank testifying that such an occurrence is impossible. Now, it is perfectly competent for the jury to believe and find the fact to be with the nonexpert witness, as against the united opinion of the experts; but, on the other hand, if the jury believes that, notwithstanding the

high character and good faith of the nonexpert, he has been misled in the matter by some mistake in observation or by some deceit practiced upon him of which he has no suspicion, there ought to be, and in our judgment there is, no rule of law which prevents the return of a verdict according to such finding. As bearing upon this proposition, see *Carter v. Baker*, Fed. Cas. No. 2472; *Humphries v. Johnson*, 20 Ind. 190; *Cuneo v. Bessoni*, 63 Ind. 524; *Leitch v. Ins. Co.*, 66 N. Y. 100; *Watson v. Anderson*, 13 Ala. 202; *Stevens v. City*, 42 Minn. 136 (43 N. W. 842); *Louisville, etc., R. R. Co. v. Whitehead*, 71 Miss. 451 (15 South. 890, 42 Am. St. Rep. 472); *Thompson v. Ish*, 99 Mo. 160 (12 S. W. 510, 17 Am. St. Rep. 552); *R. R. Co. v. Thul*, 32 Kan. 255 (4 Pac. 352, 49 Am. Rep. 484); *Kennedy v. Upshaw*, 66 Tex. 442 (1 S. W. 308); *Chandler v. Thompson* (C. C.) 30 Fed. 38; *Sanders v. State*, 94 Ind. 147; *Bever v. Spangler*, 93 Iowa, 576; *Watson v. Watson*, 58 Mich. 507 (25 N. W. 497); *State v. Miller*, 9 Del. 564 (32 Atl. 137); *Eggers v. Eggers*, 57 Ind. 461; *Ryder v. State*, 100 Ga. 528 (28 S. E. 246, 38 L. R. A. 721, 62 Am. St. Rep. 334). A study of the precedents will develop some confusion in the statement of rules governing the weight and effect to be given to expert testimony; but the reasonable rule, applicable at least to the great majority of cases, would seem to be that expert testimony is to be given consideration like all other testimony which the court allows to go to the jury, and accorded such weight as, in view of all the evidence of every kind and nature and its reasonableness and the apparent candor and competency of the witnesses, in fairness demand. See, note, to *Hull v. St. Louis*, 138 Mo. 618 (42 L. R. A. 753, 40 S. W. 89). All this is but another way of stating the elementary doctrine that the jury is to give the evidence, and all of it, full and fair consideration, and therefrom draw the conclusion which the judgments and consciences of the jurors approve as just and right.

Of the thirteenth paragraph we have also to say that it

is erroneous under the rule applied in *Kirsher v. Kirsher*, 120 Iowa, 342; *Stutsman v. Sharpless*, 125 Iowa, 341, and *Hall v. Rankin*, 87 Iowa, 264. In the first

6. SAME.

place, after informing the jury correctly that the value of an expert answer to a hypothetical question depends upon whether the facts assumed in the question have been proved to be true, the instruction proceeds to tell the jury that they *may* attach no weight whatever to the witness' opinion, if they find that any of the "*material statements*" embodied in the question are not correct and such erroneous statements are of a character "to utterly destroy the reliability of opinions based upon the supposed state of facts contained in such questions." Again, in concluding the paragraph, the jury is told that an opinion based upon a state of facts "wholly incorrectly assumed," or "incorrect in its material facts, to such an extent as to impair the value of the opinion, is of *little or no weight*." This clearly allows the jury (1) to pass upon the materiality of a false assumption of facts in a hypothetical question to an expert, (2) to determine whether a false assumption of a material fact is of such a character as to impair or destroy the value of the expert opinion based upon it, and (3) to accord *some* weight to an opinion based upon an assumption which is wholly or partially incorrect in its recitals of facts. Without taking time to discuss these propositions, we will say that the materiality of the facts is a matter for the court alone, and the jury is bound to assume that any fact or circumstances allowed in evidence by the trial court is material and entitled to consideration. Again, a hypothetical question embracing a series of assumed facts is one complete structure, and the court and jury are required to assume that every component part or element therein is considered by the expert in reaching the opinion which he gives in answer thereto. It is not for the court or jury to say that any one of the assumed facts was disregarded or ignored by the witness in forming his opinion, and therefore, if in deliberating upon

its verdict the jury finds that one or more of the assumptions indulged in by counsel in framing the question have not been established, the testimony based thereon should be wholly discarded; it has not even "little weight."

IV. As the case must be reversed on other grounds, and as upon a new trial other and different testimony may be developed, we refrain from any discussion of the sufficiency of the evidence to sustain a verdict for the plaintiff.

Many other questions have been argued by counsel, but the conclusions we have already announced render the discussion of most of them unnecessary. Other objections urged will doubtless be avoided on a new trial.

For the reasons stated, the judgment of the district court is *reversed*.

CLINTON NOVELTY IRON WORKS, Appellant, v. A. NEITING,
Appellee.

Corporations: PUBLICATION OF NOTICE OF INCORPORATION. A notice
1 of incorporation printed in a newspaper published in a small town remote from the corporation's principal place of business, when there are several other papers of more general circulation published in larger and more accessible towns, is not a compliance with the statute requiring such notice to be printed in a newspaper as convenient as practicable to the principal place of business, and will not effect incorporation.

Same: INDIVIDUAL LIABILITY OF STOCKHOLDER. The individual prop-
2 erty of one who acquires an interest in a corporation within the three months allowed for publication of the notice of incorporation, is subject to the claims of creditors thereof arising after he became a member, where there was a failure to publish legal notice and no showing that such stockholder did not know all the facts connected with the organization at the time he became a member, or when the indebtedness was incurred.

Appeal from Cedar District Court.—HON. J. H. PRESTON,
Judge.

FRIDAY, MAY 17, 1907.

ACTION at law to recover from defendant, as stockholder in an insolvent so-called corporation, the amount of a judgment held by plaintiff, upon the ground that the said pretended corporation, known as the "Cedar County Lumber & Manufacturing Company," was never organized as provided by law. The case was tried to a jury, resulting in a directed verdict for defendant, and plaintiff appeals.—*Reversed.*

Grimm, Trewin & Moffit and Ellis & McCoy, for appellant.

Chas. W. Kepler & Son, for appellee.

DEEMER, J.—On June 5, 1902, there was filed with the recorder of deeds of Cedar county articles of incorporation of the Cedar County Lumber & Manufacturing Company, which were duly signed and acknowledged. These articles were also filed with the Secretary of State on June 16, 1902, and on the same day, to wit, June 16, 1902, the said Secretary of State issued his certificate to the effect that the articles had been filed in his office. The articles named the town of Lowden, in Cedar county, Iowa, as the corporation's principal place of business. At the time of filing no newspapers were published in the town of Lowden, and publication of the notice of incorporation required by law was made in the *Durant Star*, a newspaper published in the town of Durant, in Cedar county, on June 19 and 26 and July 3 and 10, 1902. Durant is a small town more than twenty miles by wagon road, and more than fifty miles by rail, from Lowden. On July 18, 1902, a newspaper was established at Lowden, which has been issued ever since, but no publication of notice was ever made in that paper. The

1. CORPORATIONS:
publication of
notice of in-
corporation.

town of Clarence is eight miles from Lowden, Stanwood thirteen miles, and Mechanicsville eighteen miles from Lowden, either by wagon road or rail. The county seat of the county, Tipton, is seventeen miles by wagon road, and twenty-two miles by rail, from Lowden, and the town of Bennett is eleven miles by wagon road, and thirty miles by rail, distant therefrom. In each of these towns one or more regular weekly newspapers of general circulation were published during the year 1902, but no notices of incorporation were published therein. In the county seat town two newspapers of general circulation in Cedar county were published, each of them having a large circulation and being official papers; and at Stanwood, a town having a population of four hundred and fifteen according to the 1900 census, there was one paper regularly published, which was also an official paper of the county. The population of the other towns mentioned, according to the census for the year 1900, was as follows: Tipton, 2,513; Clarence, six hundred and seventy-five; Mechanicsville, seven hundred and three; Bennett, two hundred and thirty-eight; and Durant, five hundred and sixty. After September 16th of the year 1902 plaintiff sold to the so-called corporation goods to the amount of \$255.15, and, the account remaining unpaid, it obtained judgment thereon against the corporation in May of the year 1904. Defendant was not one of the original organizers or promoters of the corporation but acquired stock therein to the amount of \$1,000 on September 9, 1902, for which he paid cash at the par value thereof. On November 20, 1902, the corporation made an assignment for the benefit of its creditors, and in administering upon its assets there was not enough to pay the preferred creditors. At the time the indebtedness to plaintiff was contracted, defendant was a stockholder and director and the secretary of the corporation.

It further appears from the evidence, which is undisputed, that Lowden is in the northeastern part of Cedar

county on the main line of the Chicago & Northwestern Railway, and that Durant is in the extreme southeastern part of the county on the main line of the Chicago, Rock Island & Pacific Railway, and that to reach Durant from Lowden, by rail, a traveler must go through Clarence, Stanwood, Tipton, and Bennett, thence into another county, where a change of cars must be made, and back to Durant. A branch line of road runs from Clarence to Tipton, a main line from Tipton to Bennett, a branch from Bennett to Stockton, and a main line from Stockton to Durant. There is no testimony as to the extent of the circulation of the Durant Star; but the town in which it is published is small, and, located as it is, it is quite likely that its patronage is local and confined to the particular locality served. The town itself is near the common corner of Muscatine, Scott, and Cedar counties, and the rail connections between Lowden and Durant are such that in all probability there is little or no business connection between the two places.

In one respect this case is ruled by *Berkson v. Anderson*, 115 Iowa, 674, wherein it is said, regarding the publication of the notice of incorporation: "The statute provides that a notice must be published in some newspaper as convenient as practicable to the principal place of business of the corporation. . . . The word 'convenient' has many definitions; but, as used in this statute, it seems to us but one thought in relation thereto could have been in the minds of the makers of the law. The requirement that the notice be published in some newspaper as convenient as practicable to the principal place of business of the corporation means that it shall be published in the nearest or most handy paper suitable therefor. Any other construction of the language used, in view of the general context, would be strained and unnatural. . . . We must hold, however, that the publication of the notice under consideration was not in substantial compliance of the law; otherwise, no limits can be prescribed in which such a notice may not be legally pub-

lished. . . . The publication of the notice before us, not being in substantial compliance of the statute as to place, must be held to be no notice at all, and consequently no protection to the defendants." In view of the facts before us, it seems that it would hardly be possible to find a newspaper more remote from Lowden than the one in which the notice in the instant case was published; and, applying the rule in the *Berkson* case to this, it is clear that defendant is liable, unless it be for the matters to which we shall now refer.

It is first said that no notice was required until three months after the certificate was issued by the Secretary of State (Code, section 1614), and that the corporation made an assignment within the three months allowed for the publication. This proposition is based upon a mistake in the abstract, which was corrected before the submission of the case. We now have certified the certificate of the Secretary of State, which was issued June 16, 1902. This is conclusive upon the proposition.

II. Next it is argued that, as defendant was not an organizer or promoter of the corporation and in no way responsible for the failure to give proper notice, he cannot be held personally liable. But it will be observed that defendant became a member of the organization within the three months allowed for the publication of a proper notice, that he was one of the directors and an officer of the corporation, and that plaintiff sold the goods after defendant acquired his stock. Plaintiff sold its goods after the expiration of the three months for the publication of the notice, and had the right to suppose that proper notice had been given. At least, its sale was not during the period allowed for the giving of notice, and therefore there are no equities in defendant's favor. There is no showing that defendant did not know all the facts connected with the organization of the corporation at the time he became a member or when plaintiff sold it the goods.

2. SAME: individual liability of stockholders.

Whatever the rule might be as to an innocent purchaser after the expiration of the time for publication of notice, defendant is in no position to urge that there are equities in his favor which will relieve him. He is only relieved from individual liability because he was a member of a *de jure* corporation which limited liability of its members to the amount of stock subscribed and paid for. If the corporation was not legally organized, he was liable under the facts disclosed under our statute, which provides that for failure to substantially comply with the requirements as to notice, etc., the individual property of the stockholders shall be liable for the corporate debts. See Code, section 1616. Our conclusions find support in what is said in *Seaton v. Grimm*, 110 Iowa, 145, and in the cases therein cited.

The trial court was in error in directing a verdict for the defendant, and its judgment must be, and it is, *reversed*.

JOHN A. GREEN, Appellant, v. W. A. FORNEY, LETTIE FORNEY, GEO. T. HEDGES & COMPANY, GEORGE T. HEDGES, ALBERT M. WALTERS, JAMES L. BEVER and the BEVER LAND COMPANY, Appellees.

Homesteads: LIABILITY FOR DEBTS. A creditor cannot subject the
1 proceeds of a homestead, acquired before the debt was contracted, to the payment of his claim.

Husband and wife: SEPARATE ESTATE OF THE WIFE. Property ac-
2 quired by the wife with funds arising from her own separate enterprise, carried on with the consent of her husband, cannot be subjected to the payment of his debts; and labor performed by the husband in improving the property will not render it his, since he may give his time and exempt earnings to his wife if he chooses.

Creditors bill: RIGHT OF ACTION. The judgment of a Superior
3 Court with the clerk's filing indorsed thereon is not sufficient basis for a creditor's bill.

Appeal from Linn District Court.—HON. J. H. PRESTON,
Judge.

FRIDAY, MAY 17, 1907.

THIS is a creditor's bill, aided by attachment, upon which several garnishments were run to subject certain property in the names of Lettie Forney and Nellie P. Walters to the payment of plaintiff's judgment against W. A. Forney. Other defendants were garnished as debtors of W. A. Forney. The trial court dismissed the petition, and plaintiff appeals.—*Affirmed.*

Redmond & Stewart, for appellant.

Jamison & Smythe, for all appellees save Nellie P. Walters.

DEEMER, J.—Plaintiff holds a judgment against W. A. Forney for the sum of \$916.50, rendered upon notes executed by defendant in the year 1896, and this action was brought to subject certain rights and equities which it is claimed defendant Forney had in certain lots in the city of Cedar Rapids. In November of the year 1885, a deed was made to Lettie A. Forney for one of the lots in controversy. On March 21, 1903, Lettie A. Forney contracted to sell this lot to Nellie P. Walters for the consideration of \$1,800, \$100 of which was paid in cash, and the remainder was to be paid in monthly installments of \$18 each. At the time of trial something over \$1,200 was due on this contract. On April 18, 1903, Lettie Forney purchased the other lot from the Bever Land Company, paying \$1,000 in cash, providing for the payment of the balance of the purchase price, to-wit, \$1,450, in monthly installments of \$30 each. In the fall of the year 1903, Lettie Forney sold this lot to John Gray for the agreed price of \$4,150, but she reserved possession until the spring of the year 1904. At the direction of Lettie Forney, deed was made by the Bever Land Company direct to Gray, and at that time there was due the Bever Land Com-

pany from Lettie A. Forney the sum of \$2,337.71. This amount was taken out of the purchase price agreed to be paid by Gray, and the remainder was paid to the Forneys. About the time Mrs. Forney contracted to sell the lot to Gray, she entered into a contract with the Bever Land Company for the purchase of the other lot in controversy, agreeing to pay therefor the sum of \$3,250, \$100 of which was paid in cash in October of the year 1903, and \$1,000 on March 1, 1904, and the balance was to be paid in monthly installments of \$30 each. At the time of the trial, there had been paid on this contract the sum of \$1,379.07, leaving a balance due the land company of \$1,870.93. This latter property was valued at the time of trial at \$4,650.

Plaintiff seeks to reach the equity in these two properties, to-wit, \$1,212 in the property first described, and \$2,629 in the property last mentioned, claiming that, although in the name of Lettie Forney, it in fact belonged to Wm. A. Forney. It is claimed that all money thereon came from the earnings of her husband, and that she held the title in trust for him and his creditors, and that, even if she furnished part of the consideration, the remainder should be subjected to the payment of the judgment. These are purely fact propositions, and it will be useless to set out the testimony in detail bearing thereon. The property first described was and is the homestead of the Forneys' and, as title thereto was acquired before plaintiff's debt was contracted, he has no right to subject the proceeds of the sale to the payment of his judgment.

Moreover, we think the record fairly shows that Mrs. Forney furnished the entire consideration for the lot, receiving the same from the keeping of boarders with the consent of her husband that she carry on that business for herself and in her own right. These funds belonged to the wife. *Ehlers v. Blumer*, 129 Iowa, 168. As a conclusive answer to appellant's contention on this point, it is enough to say that, while Nellie P. Walters, the purchaser of the property and

the debtor therefor, was named as a defendant, she was not in fact a party to this action. This clearly appears from a transcript of the record which has been certified for our inspection. Code, section 4089. As to the other lot which Mrs. Forney purchased from the Bever Land Company, she used part of the consideration which she received indirectly from Mrs. Walters in the purchase thereof, and the remainder she obtained in the advance in price of the Gray property and from keeping boarders, save what work her husband did in the matter of making improvements upon the various properties. Wm. A. Forney is a plasterer, and as such did work upon his wife's property. This did not make the property his, and he was so far as his creditors were concerned, justified in giving his time and work to his wife. Moreover, he had the right to give her all his exempt earnings. *Carse v. Reticker*, 95 Iowa, 25; *Foreman v. Bank*, 128 Iowa, 661; *Machine Co. v. Pouder*, 123 Iowa, 17; *Deere v. Boone*, 108 Iowa, 281. It also appears that Lettie Forney was state deputy of the Ladies' Auxillary of the A. O. U. W., and that as such she received \$1.50 per day for her work for two years, which amount was also put into the properties purchased by her. We think plaintiff has entirely failed to make out either a case of fraud or of secret trust.

As a conclusive answer to plaintiff's entire case, it appears that the judgment upon which he claims is from the Superior Court of the city of Cedar Rapids. No other judgment is shown. There is indorsed upon the back of a transcript thereof the following: "Filed Nov. 26, 1904. C. W. Braska, Clerk." This is the entire showing, save some declarations of counsel as to what this means. It is manifestly not a sufficient basis for a creditor's bill. *Peterson v. Gittings*, 107 Iowa, 306; *Drahos v. Kopesky*, 132 Iowa, 497.

For the reasons stated, the judgment and decree of the District Court is *affirmed*.

IN THE MATTER OF THE ESTATE OF HANNAH HENDERSHOTT,
deceased, C. M. GRUWELL, Proponent of the will,
Appellant, v. W. J. HENDERSHOTT ET AL., Contestants.

Wills: CONTEST: CAPACITY: EVIDENCE. The pleadings and decree
1 in a suit by one as guardian of decedent against the proponent
of her will cancelling certain contracts made by decedent at
about the time of executing the will, on the ground of mutual
incapacity, are admissible in a contest of the will on the issue
of testamentary capacity, contestants being privies to the
adjudication and proponent estopped to question the same.

Order of proof: DISCRETION: HARMLESS ERROR. The order of in-
2 troduction of evidence is largely discretionary, and although
the court excluded a purported revocation of the will in con-
test when offered as a part of contestant's evidence in chief,
but admitted it in rebuttal, the rights of proponents are held
not to have been prejudiced thereby, especially as they did not
ask leave to introduce further evidence.

Will contests: TAXATION OF COSTS. The costs of a will contest,
3 where the proponent is claiming the estate under the will and
contestants as heirs at law and next of kin, should be taxed
to the unsuccessful party under the general rule.

Appeal from Cedar District Court.—HON. G. THOMPSON,
Judge.

FRIDAY, MAY 17, 1907.

PROCEEDINGS for the probate of a will, contested by the
heirs at law of testatrix, on the grounds that she was of un-
sound mind when said will was executed; that said will was
procured by the undue influence of proponent, who was
named as the beneficiary; that said will was subsequently
revoked. The jury found that the will offered for probate
was not the valid will of deceased, and judgment was entered
for contestants. The proponent appeals.—*Affirmed.*

G. C. Hoover and Wright, Leech & Wright, for appellant.

Henry Negus and Baker & Ball, for appellees.

McCLAIN, J.—I. Contestants offered in evidence the pleadings and decree in a proceeding by Robert B. Smith as guardian of Hannah Hendershott against C. M. Gruwell, the proponent in this case, to have canceled

1. WILLS: con-
test: capacity:
evidence. certain assignments of notes by her to said

Gruwell, on the ground that said assignments were fraudulently procured; and, further, to have canceled and set aside on the same ground a certain contract between Hannah Hendershott and said Gruwell by which she agreed to make the will in his favor, which is offered for probate in this proceeding, in consideration of care to be rendered and conditions performed by said Gruwell. Proponent's objections to the introduction in evidence of these pleadings, on the general ground that they were incompetent, irrelevant, and immaterial, and of the decree on the further ground that it in no way affected the parties in the case, were overruled. If the decree was admissible the pleadings in the case in which the decree was rendered were also admissible, as showing the force and effect of the decree. In this decree the court found that Hannah Hendershott was of unsound mind and incompetent to execute a contract at the time said alleged contract was executed and said alleged assignments were made, and ordered that said contracts and assignments be set aside and cancelled. By the allegations of the pleadings under which the decree was entered, and by the other evidence introduced in this case, it was made to appear that the assignments and contract were executed at about the same time as the will, probate of which is proposed in the present case, and as parts of a general plan to convey, devise, and bequeath all of testatrix's property to this proponent; and, if she had not sufficient capacity to make the assignments and exe-

cute the contract, she was not capable of making a valid will. If, then, the contestants of his will are privies to the adjudication in the action by the guardian, this proponent, who is asking to have the will probated for his benefit, cannot say that the decree in no way affects him, for it directly relates to the capacity of testatrix to execute the will. It cannot be doubted that, if testatrix herself during her lifetime had brought the action which was brought by her guardian, and this decree had been entered in such action, the finding would have been competent evidence against this proponent, as to her capacity to make the will. The proceeding in behalf of testatrix by her guardian was in law a proceeding instituted by her, for the guardian conclusively represented her. 1 Hermann, Estoppel, 377. The contestants, claiming interests in the estate of Hannah Hendershott as heirs at law and next of kin, are privy, therefore, to the adjudication, and proponent, who was defendant in that proceeding, cannot question the conclusion of the court expressed as an essential finding in that decree that Hannah Hendershott had not mental capacity to make the contract. That finding was admissible in evidence against proponent, on the question of the capacity of testatrix to make the will. As tending to support this conclusion, see *Sly v. Hunt*, 159 Mass. 151 (34 N. E. 187, 21 L. R. A. 680, 38 Am. St. Rep. 403); *Manley's Ex'r. v. Staples*, 62 Vt. 153 (19 Atl. 983, 8 L. R. A. 707). The decree and pleadings were therefore properly received in evidence.

II. Complaint is made of the action of the trial court in admitting what was claimed to be a revocation of the will, when offered by contestants in rebuttal, although it had been excluded when first offered by them as a part of their evidence in chief. The order of introduction of evidence is largely in the court's discretion. It may be that when first offered so strong a case of mental incapacity continuing from a time prior to the making of the will up to testatrix's death had

2. ORDER OF
PROOF: discretion:
harmless
error.

been made out that the court could not properly assume that testatrix had capacity to execute a valid revocation; but that, after the evidence for proponent had been introduced, there was a question as to capacity which could properly be submitted to the jury. No complaint is made as to the instructions on the subject, and we assume that the question was properly submitted. No prejudice to proponent appears, for he did not ask an opportunity to introduce further evidence, and simply reasserted the objection made when the instrument of revocation was offered in chief.

III. The costs were properly taxed to proponent. The trial was simply a contest between proponent, claiming the estate of deceased under the will, and contestants, claiming it as heirs at law and next of kin; and the costs were properly taxed to the unsuccessful party, under the general rule. See Code, section 3853; *Allen v. Seaward*, 86 Iowa, 718; *In re Nicholson's Will*, 123 Iowa, 630; *Beebe v. McFaul*, 125 Iowa, 514.

The judgment of the lower court is correct, and it is affirmed.

CITIZEN'S SAVINGS BANK OF OLIN, Appellee, v. DON L. GLICK, ET AL., Appellants.

Fraudulent conveyances between husband and wife. Where a

- 1 debtor has no property as a basis of credit other than certain lands standing of record in his name and with the knowledge of his wife he acquires credit on the strength thereof, an unrecorded conveyance to the wife, which is secretly held by her at the time the indebtedness arose, will be set aside at the suit of the creditor, except as to that part to which a homestead right has attached.

Homestead: FORFEITURES. Neither the fact that a mortgagor may

- 2 have testified falsely in assisting the mortgagee to establish the lien of his mortgage as against an attaching creditor, nor failure of the mortgagor to demand that the mortgagee be first required to exhaust the non-exempt property, will operate as a

forfeiture of homestead rights, or warrant a decree requiring that the homestead be first applied to the satisfaction of the mortgage; since a homestead once vested cannot be forfeited except through abandonment or relinquishment.

Appeal from Jones District Court.—HON. W. G. THOMPSON, Judge.

FRIDAY, May 17, 1907.

ACTION originally brought at law against the defendant Don L. Glick, to recover judgment on promissory notes. The action was aided by attachment; and, by direction of plaintiff, four separately described tracts of land — one of forty acres, one of nineteen acres, one of one acre, and one of an undivided one-half of fifteen acres — were levied upon. At the time of such levy the legal title to each of said tracts of land stood in the name of Nettie S. Glick, wife of defendant. The defendant did not appear to the action, and on May 16, 1905, a default judgment was entered against him for the amount claimed in the petition. It does not appear that the judgment entry contained any order in respect of the attached property. Mrs. Glick was not made a party defendant, but on May 20, 1905, she appeared in the action and filed a petition of intervention as against plaintiff, in which she made claim to all the attached property as belonging to her individually, that the same had been given to her by her parents at the time of her marriage, and that, although the legal title thereto had been at one time in her husband, yet as matter of fact he had never been possessed of any interest therein. She also pleaded in general terms a homestead right.

Plaintiff appeared to this petition, and answered, asserting ownership in the property in the defendant at the time the debt merged into the judgment against him was contracted, and charging fraud and want of consideration in the conveyance to intervener. The prayer was that the lien of the judgment against defendant be established, for a spe-

cial execution, etc. On the same day S. W. Cole appeared in the action and intervened as against plaintiff, setting up an interest in the attached property in virtue of two mortgages held by him — one dated March 1, 1903, executed by defendant and his wife, and purporting to secure payment of a debt of \$1,000; the other dated January 20, 1905, executed by Nettie S. Glick alone, and purporting to secure payment of a debt of \$2,600. The prayer of his petition was simply that such mortgages be decreed to be liens on the property superior to plaintiff's attachment. This petition was also answered by plaintiff; the contention made being that the mortgages were fraudulent and without consideration. Notices of the petitions of intervention were not served upon the defendant as far as appears from the record, and he made no appearance to such petitions; nor was notice of the intervention of Cole served upon Mrs. Glick, and she made no appearance thereto. Trial was had upon both interventions at one time and in equity. In the decree entered the court found that as to plaintiff the conveyance of the attached property was fraudulent and void, that the mortgage for \$1,000 held by intervenor Cole was a valid lien on the property, but that the mortgage for \$2,600. was fraudulent and void. It was further found "that the defendant Don L. Glick and Nettie S. Glick are entitled to the exemption of a homestead out of the premises, to be selected by them." This then follows:

The court further finds that said Don L. Glick and Nettie S. Glick, through aiding and assisting in having the mortgage claims of Cole established as a lien upon said premises, and having failed to ask that the said Cole be required to first exhaust the premises described in his said mortgage other than the homestead, it is therefore ordered, adjudged, and decreed by the court that the premises first herein described are subject to the plaintiff's judgment, except a homestead to be selected by the defendants not exceeding forty (40) acres, and that the mortgage of Don L. Glick and Nettie S. Glick to S. W. Cole of January 20, 1905, is fraudulent

and void, and that the mortgage of Don L. Glick and Nettie S. Glick of March 1, 1903, is a valid lien, but S. W. Cole, intervener, is ordered, adjudged, and decreed to first exhaust that part of the premises which may be selected by the defendants not exceeding forty (40) acres as a homestead before resorting to the other premises first above described.

From the decree so entered the interveners appeal.—
Reversed and remanded.

Wright, Leach & Wright and Park Chamberlain for appellants.

Jamison & Smyth, for appellee.

BISHOP, J.— It appears that the forty-acre tract, the nineteen-acre tract, and the one-acre tract lie contiguous to each other, and form one body of sixty acres of land. The fifteen-acre tract, an undivided one-half of which is in question, lies three miles distant, and is woodland. Defendant and his wife were married some fifteen years ago, and soon thereafter the intervener, Cole, father of Mrs. Glick, conveyed the sixty acres to defendant, subject, however, to a mortgage of \$1,000. The deed was at once placed on record, and defendant and his wife entered into possession of the premises, and have ever since resided thereon, as a home place. It is contended for appellants that the conveyance of the equity in the land was intended as a gift to Mrs. Glick, and this was probably so. Later on Cole bought up the mortgage and canceled the same upon the execution in March, 1903, of the mortgage described and counted on in his petition of intervention. The woodland was purchased about twelve years ago, and the title taken in the name of defendant. Mrs. Glick declares that the tract was purchased and paid for by her, and that she does not know how the title came to be so taken. In February, 1902, the defendant executed a deed of all the property in question to his wife. At the time of the execution the deed was not acknowledged, nor

until in December, 1903. According to Mrs. Glick, it was not until late in the year 1904 or early in the year 1905, when the deed was made a matter of record; that in the meantime it had been lying among other papers in the house. It appears without dispute that the indebtedness of defendant to plaintiff represented by the judgment accrued in its entirety between the dates of the execution of the deed from defendant to his wife and of the recording of such deed.

We are in no doubt as to the correctness of the decree to the extent that thereby the conveyance from defendant to his wife was found to have been conceived in fraud. At the

1. FRAUDULENT
CONVEYANCES
AS BETWEEN
HUSBAND AND
WIFE.

time such conveyance was executed defendant had or was about to embark in a line of business apart from the operation of the farm, and in which credit was at least desirable.

Aside from the lands standing in his name, he had no other property of any moment, and plaintiff extended credit to him in ignorance of the deed to his wife, or that she had rights of ownership in the lands. And it must be said that Mrs. Glick had knowledge that her husband was doing business with plaintiff bank, and that the lands were a source of credit on faith of the ownership of which loans were being obtained by him. That a conveyance made under such circumstances will be set aside in equity at the instance of a creditor who but therefor would have a right at law to resort to the property for the satisfaction of his debt is well-settled doctrine. *Courtright v. Courtright*, 53 Iowa, 57; *Patterson v. Hill*, 61 Iowa, 536; *Porter v. Goble*, 88 Iowa 565; *Iseminger v. Criswell*, 98 Iowa, 382. But the rights of creditors at law or in equity extends no further than to the property lying outside the limits of the homestead when platted. As a general creditor can have no right in property to which a homestead right has previously attached, the owner is free to make any disposition that he pleases. *Dettmer v. Behrens*, 106 Iowa, 585; *Mitchell v. West* (Iowa), 93 N. W. 380. And it can

make no difference that a plat of the homestead had not been made and recorded at the time conveyance thereof was made. *Mitchell v. West, supra.*

Now, here the intervenor made claim of a homestead right in herself and the defendant, her husband, and the provision of the decree declaring for the existence of such right was in all respects warranted by the evidence. If, then, consideration was confined to the rights of plaintiff and Mrs. Glick, it is plain that the decree rightly provided in favor of the latter for the selection of a homestead, and awarding execution in favor of the former as against the lands left over after such selection.

The trouble in the case arises out of the remaining provisions of the decree. The purpose of the intervention on the part of Cole is not quite clear. Had he remained away, neither the action of plaintiff, nor anything that might have been done thereunder, could have affected his mortgage interests. It will be remembered that his prayer was simply for a decree adjudging the lien of his mortgages to be superior to that acquired by plaintiff under its attachment. He needed no such decree. His mortgages were prior in time of execution and record. The law fixed his status, and he was secure as against everything except a direct assault upon the bona fides of his holdings. In this situation his intervention amounted to nothing more than an invitation to plaintiff to join in an issue respecting bona fides. Plaintiff might well have moved to strike, but it chose to join issue, and it does not complain of the result. We think Cole is in no position to complain. He selected the proceedings in which to exhibit his mortgages, and to try out the question of priorities. The court found that the \$1,000 mortgage was valid, and decreed the establishment of the lien thereof as prior to the attachment, and it found the \$2,600 mortgage to be fraudulent and void. It may be added in this connection that the decree as entered did not award an execution or otherwise make provision for a sale of the property, in whole or in part.

Conceding, then, that the court was in error in supposing the case to be one for the marshaling of assets, and in ordering that Cole should first exhaust the portion of the property selected as a homestead, still he could not be prejudiced thereby. The existence of his lien, and the priority thereof, was not disturbed in the least. At best, the provision of the decree could have effect only to direct the order of sale in case he should ever conclude to proceed to a foreclosure.

Considering now the \$2,600 mortgage, it is to be said that on the facts as presented by the record a finding that the same was fraudulent was fully warranted. The execution

thereof was by Mrs. Glick alone. It was
2. HOMESTEAD:
forfeitures. wholly voluntary, without knowledge on the part of Cole, and without sufficient consideration. Quite different, however, is the situation respecting the scope and effect of the decree when considered from the view point of Mrs. Glick. Aside from her claim of ownership — respecting which enough has already been said — the issue tendered by her was that of a homestead as exempted by statute. Her petition did not even make mention of the mortgages executed to and held by Cole. And as related to the claim of homestead, plaintiff's answer to her petition was no more than a general denial. She was not made a party to the intervention by Cole, and, respecting the matters there in issue neither Cole nor plaintiff made demand for any relief as against her. In this state of the pleadings it does not seem that there could be justification for a determination of more than the simple fact question of her right to a homestead. Certainly there was no call to determine any rights of Cole against her, for he was asserting none. Nor was plaintiff asserting any rights or demanding any relief as against her in respect of the Cole mortgages. But, as will be observed, in the decree the defendant and his wife are charged with having aided and assisted Cole in having his mortgage liens established. So, too, it is recited that they failed to ask that Cole be required to first exhaust the property outside of the

homestead. And it would seem from the reading that the requirement of the decree respecting the homestead was predicated on the facts as so found.

Forgetting for the moment that the finding was not called out by any issue in the case, it remains to be said that there is no basis either in the fact situation or in law on which the decree can be sustained. To begin with, Don L. Glick was a stranger to the intervention proceedings. His homestead rights could not, therefore, be affected by any order embodied in the decree. What is the meaning or significance of the finding to the effect that the Glicks had aided and assisted Cole in having his mortgage liens established is beyond our comprehension. It is true that both Mr. Glick and Mrs. Glick were witnesses on the trial. Both testified in respect of the \$1,000 mortgage, and, as we have seen, the decree sustains that mortgage. Mrs. Glick testified to her execution of the \$2,600 mortgage, and that the same was in good faith and based on consideration, while Mr. Glick testified that he knew nothing about the existence of such mortgage. Hazarding a conjecture, it is possible the thought of the finding was that in giving her testimony Mrs. Glick had sworn falsely, in consequence whereof she had forfeited her right to have the lands outside the homestead first exhausted in satisfaction of the mortgage debt. If such was the thought, the finding has the merit of extreme novelty, in that it is opposed to all reason and contrary to all authority. If such was not the thought, we can go no farther. We are at the limit of our conjectural resources. It seems hardly necessary, but we may add that, whatever the thought of the finding, a right of homestead once vested cannot be forfeited by any misconduct. It continues until lost through abandonment or is parted with by voluntary relinquishment.

But a few words will be necessary to dispose of the remaining branch of the finding under consideration. As matters stood, neither Glick nor his wife were under any duty or necessity of asking that Cole be required to resort first to the

non-homestead property included in his mortgage. It would be in good time for them to assert their homestead rights, when confronted with a direct attempt to deprive them of such rights, as when notified by the sheriff of his purpose to sell under execution. As we have seen, there was no issue between Cole and the Glicks, and Cole was the only person who had any rights in the homestead estate. Until such time as he chose to assert his right as against the Glicks, there was no call on them to make demand respecting the order in which the mortgaged property should be sold. But, if this were not true, it is impossible to conceive how a failure to claim a right as against Cole could operate to confer a right upon plaintiff that otherwise it did not have, and could not obtain.

Upon the situation as a whole, we conclude that plaintiff's attachment was not only subject to the lien of the \$1,000 mortgage held by Cole, but to all homestead rights of the Glicks, including the right to have the non-homestead property first subjected to the payment of the mortgage debt.

The decree of the district court is reversed. and the case is ordered remanded for a decree in harmony with this opinion.— *Reversed.*

C. C. BECK v. E. A. VAUGHN ET AL., Appellants.

Intoxicating liquors: INJUNCTION: NOTICE: JURISDICTION. When

- 1 a temporary injunction is sought to restrain an alleged liquor nuisance the same formality of notice is required as in any other form of action, and a notice which fails to name the judge to whom the application will be made and the particular place where it will be heard is insufficient and does not confer jurisdiction, and any decree entered in pursuance thereof is void and may be assailed in any court.

Same: WANT OF JURISDICTION: WAIVER. Appearance to a contempt

- 2 proceeding for violating a temporary injunction, which was issued without jurisdiction, will not confer jurisdiction to enter a valid decree on final hearing.

Nuisance: JURISDICTION: ACTION IN NAME OF STATE. Only the

- 3 county attorney is authorized to bring an action in the name

of the State to restrain a nuisance and when so brought in the name of another the court does not acquire jurisdiction.

Injunctions: costs. The costs in an action to enjoin the enforcement of an illegal decree abating a nuisance are properly taxable to the party who was active in procuring the decree to abate the nuisance.

Appeal from Linn District Court.—HON. B. H. MILLER, Judge.

FRIDAY, MAY 17, 1907.

SUIT in equity to enjoin the defendant from attempting to enforce a decree of the District Court enjoining the plaintiff herein from keeping a nuisance, and asking that the decree so enjoining him be set aside. There was a judgment for the plaintiff, from which the defendants appeal.—*Affirmed.*

Chas. W. Kepler & Son, for appellants.

E. C. Barber, J. M. Gray, and John A. Reed, for appellee.

SHERWIN, J.—In January, 1905, the defendant E. A. Vaughn commenced an action, in the name of the State of Iowa, against C. C. Beck, the plaintiff herein, Orie Hunter, and others for the April term, 1905, of Linn county, alleging in said petition that the defendants were unlawfully keeping and selling intoxicating liquors in a certain building within said county. The petition asked that a temporary writ of injunction issue, and that on final hearing it be made perpetual. A notice was served on the defendants, which, so far as material in our inquiry, was as follows: "You are hereby notified that the plaintiff will on the 7th day of January, 1905, at 9 o'clock, at Marion, Iowa, make application to the honorable judge of the District Court of the Eighteenth District of Iowa on the petition for an order for a tem-

porary injunction and a permanent injunction upon final hearing, . . . and you can appear at said time and resist said application if you so desire. J. M. Tallman, Attorney for the plaintiff." No other notice was served on the plaintiff, Beck, and on the 7th day of January, 1905, C. G. Watkins, who was then County Attorney of Linn county, appeared before the judge of the District Court and asked permission to appear and prosecute in behalf of the State. His application was granted, and the temporary hearing was continued until January 9th following. There was no appearance on the part of Beck on January 7th, nor on January 9th, and on the latter date the application for a temporary writ was heard and a temporary injunction issued by the District Court of Linn county. This temporary injunction was made perpetual in June, 1905. On the 13th of January, 1905, a copy of the decree granting a temporary injunction was served on the plaintiff, Beck, and on the 25th day of January, 1905, on a showing made by Vaughn that Beck had violated the temporary injunction that had been issued and served on him, Beck was notified to appear and show cause why he should not be punished for contempt. He appeared in the contempt proceedings, and filed a motion to dismiss, and afterwards a demurrer to the petition, alleging, among other things, that the judge had no jurisdiction to punish for contempt, because no proper notice was served on him of the commencement of the suit. The motion to dismiss and the demurrer were overruled, and a trial was had in the contempt proceedings, and Beck was discharged. Thereafter this suit was brought to cancel the decree granting the permanent injunction, and to enjoin the defendants from proceeding thereunder, as we have heretofore said.

From the foregoing statement of facts, it is at once apparent that the controlling question in this case is whether the judge granting the temporary writ of injunction had jurisdiction of the person of plaintiff, Beck. The appellee contends that there was no jurisdiction, and because thereof

that the decree was absolutely void; while the appellants take the position that the notice was, at most, a defective notice, that the Judge had jurisdiction, and that the appellee cannot assail the decree granting the temporary writ or the decree granting the permanent injunction in an independent action such as this. We are of the opinion that the notice set out conferred no jurisdiction upon the judge to make an order for a temporary writ. Code, section 2405, provides for actions to abate liquor nuisances, and also provides that in such action the court, or a judge in vacation, shall upon the presentation of a petition therefor, allow a temporary writ of injunction without bond, and the further provision is therein made that three days' notice in writing shall be given the defendant of the hearing of the application for the temporary writ of injunction. It is very evident that, when a temporary writ of injunction is asked of the court, the same formality of notice is required by this statute that is required in any other form of action, and that nothing less will confer jurisdiction upon the court. So far, then, as this notice may be claimed to have advised the defendants named therein that application would be made to the District Court of Linn county for a temporary writ of injunction, it was wholly insufficient. Code, section 3514, provides that the original notice of the commencement of an action shall advise the defendant that a petition on or before the date named therein will be filed in the office of the clerk of the court wherein action is brought, naming the time at which it will be necessary for the defendant to appear and defend. The notice in question clearly does not comply in any respect with this statute, and, unless it can be said that it was a sufficient notice of the application to a judge in vacation, it clearly was insufficient to confer jurisdiction for any purpose. The notice does not name the judge to whom the application for a temporary writ will be made, nor does it state the place where the judge may be found, any farther than naming the city generally where the

1. INTOXICATING
LIQUORS: in-
junction: no-
tice: jurisdic-
tion.

application will be made. This, under the rule of our cases, was clearly insufficient. *Kitsmiller v. Kitchen*, 24 Iowa, 163; *Boals v. Shules*, 29 Iowa, 507; *Lyon v. Vanatta et al.*, 35 Iowa, 521. The court being without jurisdiction, the decrees ordering the temporary writ and making the injunction perpetual were absolutely void and can be assailed and cancelled in any court. *Arnold v. Hawley*, 67 Iowa, 313; *State Ins. Co. v. Waterhouse*, 78 Iowa, 674.

The appellants urge, however, that, although the decree ordering the temporary writ may have been without jurisdiction, the appearance of the plaintiff, Beck, in the contempt proceedings gave the court such jurisdiction of his person as to enable it to enter a valid decree upon the final hearing of the injunction proceeding. This cannot be so; the proceeding for contempt in violating either a temporary or permanent injunction restraining the illegal sale of intoxicating liquors is a quasi criminal proceeding incidental only to the main action, and an appearance therein, either on citation from the court or by virtue of a warrant of arrest can in no proper sense be held to be such a voluntary appearance in the main action as will confer jurisdiction. *Fisher v. Cass County District Court*, 75 Iowa, 232; *Dist. Twp. of Lodo Millo v. Dist. Twp. of Cass*, 54 Iowa, 117.

There is another reason why the notice of the application for a temporary writ of injunction may well be held to have conferred no jurisdiction. Code, section 2406, provides that actions to enjoin nuisances may be brought in the name of the State by the county attorney, or that any citizen of the proper county may institute and maintain such a proceeding in his own name. The original notice in this case showed that the action was brought in the name of the State, but it also affirmatively showed that it was not brought by the county attorney. These actions are regulated wholly by the statute, and in bringing them there must

2. SAME: want of jurisdiction: waiver.

3. NUISANCE: action in name of State: jurisdiction.

be a substantial compliance therewith. The people of a county are presumed to know who their officials are, and, no one but the county attorney being authorized by section 2406 to bring such an action in the name of the State, the defendant named therein was not bound to respond to such an action brought by an attorney other than the county attorney.

In this case, the district court entered a judgment restraining the defendants as prayed, and taxed the cost of this action to the defendant E. A. Vaughn. This Vaughn complains of. It is made to appear that Vaughn was the active party in the proceedings against Beck, and also that he was the party threatening to institute further proceedings against Beck based on the injunction decree. Vaughn's codefendants are nominal only, being attorneys and the clerk of the court. We are therefore of the opinion that the costs of the case were properly taxed against Vaughn, and that he should pay the costs on appeal. It is not a case where a prosecution has failed, under section 2412 of the Code. If it were, a different rule would apply.

We find no cause for reversing the judgment of the district court, and it is *affirmed*.

WALTER H. LONG v. JOHNSON COUNTY TELEPHONE COMPANY, Appellant.

Master and servant: NEGLIGENCE OF MASTER: EVIDENCE. Under the
 1 evidence the question of whether defendant's foreman was negligent in directing plaintiff to remove a cross arm from one of its telephone poles without advising him of a possible danger, unknown to plaintiff but which the foreman might reasonably have known, that the pole would spring when the cross arm was removed, was for the jury.

Instructions: REFUSAL. It is not erroneous to refuse instructions
 2 which would have lead to a different verdict when the evidence supports the verdict as rendered.

134	339
140	611

134	336
143	601
144	647

Safe place to work: LIABILITY OF MASTER. Where the unsafety of
3 a place at which an employé is directed to work does not arise
from an act of his but from a previous condition known only
to the master, which rendered the place unsafe, the rule that
the master is relieved of the duty to furnish a safe place
where it becomes unsafe during the progress of the work, has
no application.

Safe place to work: WARNING: CARE. In the exercise of ordinary
4 care the master is bound to warn a servant against danger
which he has reason to believe is likely to occur upon the hap-
pening of a certain contingency, and of which the servant has
no knowledge.

Appeal from Linn District Court.—HON. J. H. PRESTON,
Judge.

FRIDAY, MAY 17, 1907.

ACTION to recover damages for personal injuries re-
ceived by the plaintiff while in the employ of defendant as
lineman, and alleged to have resulted from the negligence of
defendant in not advising plaintiff of danger involved in the
particular operation in which he was engaged. Verdict and
judgment for plaintiff. Defendant appeals.—*Affirmed.*

Dawley, Hubbard & Wheeler, for appellant.

J. M. Dower and Rickel, Crocker & Tourtellot, for ap-
pellee.

MCCLAINE, J.—It appears that the plaintiff was an ex-
perienced lineman, who at the time of the accident, in Feb-
ruary, 1904, had been in the employ of the defendant
company for two or three weeks. He was engaged at the
time of the accident with other employés in erecting a large
circle pole about sixty-five feet high, and transferring to it
a messenger wire serving to support a cable containing
many telephone wires; the purpose of the operation being
to have the cable run up the new pole to the circle at the

top. This general undertaking had been inaugurated before plaintiff entered the employ of the defendant company, and the messenger wire had been stretched from the east along a row of poles extending east and west through an alley to a pole standing about four feet from where the new pole was planted by plaintiff and others, and having been stretched by means of pulleys and tackle, had been clamped to the old pole about thirty-four feet from the ground, and attached to a "stub" about seventeen feet high and thirty-five feet west of the old pole where the messenger wire terminated. The work had been conducted under the direction and control of one Leedon, the foreman of the defendant company, in charge thereof. In the operation of attaching the messenger wire to the new pole, which was west of the old pole and between it and the "stub" to which the messenger wire was fastened, pulleys and tackle had been used to raise the messenger wire to the proper height on the new pole to correspond to the place where it was clamped to the old pole. In this operation Leedon, who was on the ground while plaintiff was on the old pole giving information as to whether the messenger wire was raised high enough on the new pole, was advised by plaintiff that the messenger wire had not yet been raised to a proper height; but, this being questioned by Leedon, who told plaintiff that he could not "see straight," plaintiff had acquiesced, and Leedon had directed the attachment to be made to the new pole, and thereupon plaintiff had loosened the clamp holding the messenger wire to the old pole. On the following day plaintiff, by direction of Leedon, went up the old pole to take off two or three cross-arms which were rendered unnecessary by the fact that the wires coming from the east and terminating at the old pole had been superseded by the cable, and in removing the second cross-arm, which was just under the clamp to which the messenger wire had been attached, relieved the pressure of the messenger wire which had rested on this cross-arm, so that the pole which had been held bent over toward the

west by the messenger wire sprung eastward at the top, giving to plaintiff, who was suspended by his belt and safety strap, a jerk, causing one of the snaps of his safety strap to break, as the result of which he fell backward to the ground and sustained severe injuries.

The negligence of the defendant, as claimed by plaintiff, consisted in the failure of Leedon to advise him that the pole was sprung over to the westward at the top, so that the release of the messenger wire by the removal of the cross-arm would cause it to spring eastward and give the jerk which occasioned his fall.

1. MASTER AND
SERVANT: neg-
ligence of mas-
ter: evidence.

It is evident that, if plaintiff was in as good a situation as Leedon to know what the consequence of taking off the cross-arm might be expected to be, then plaintiff assumed the risk of the operation, and was not entitled to recover; while, if Leedon knew of a danger involved in the operation not apparent to plaintiff, and did not advise the plaintiff of such danger, then the defendant was chargeable with negligence through the omission of Leedon, and there was no assumption of this particular risk on the part of plaintiff. As to this vital question, the testimony of plaintiff was that, while the old pole was bent to the westward, so that it was two feet nearer to the new pole at the top than at the bottom, he had no reason to suppose that this was not due to a natural bend in the pole; that when, on the day before the accident, he released the clamp holding the messenger wire to the old pole, the wire was still resting on the cross-arm, and there was no indication that the messenger wire was still holding it bent to the westward; and that he had no reason to suppose that the release of the cross-arm involved any danger that the pole would spring eastward. It appears from the testimony of Leedon, who was examined as a witness for the plaintiff, that when the messenger wire was first stretched, before plaintiff had entered the employ of defendant, the top of the pole was bent westward to some extent, and it was caused to "buckle" by the downward pressure of the mes-

senger wire as it was stretched for attachment to the "stub." But he testified that he had no knowledge that the messenger wire was resting on the cross-arm, and had reason to suppose that when the clamp was released there was nothing to prevent the pole resuming its natural position, so that, when he directed plaintiff to remove the cross-arm, he did not anticipate that the pole would spring back as the result of that operation. The whole controversy was thus narrowed down to the question whether Leedon was negligent in directing plaintiff to remove the cross-arm without advising him of any possible danger which might reasonably have been known to him, but was not known to plaintiff, that the pole would spring when the cross-arm was removed. The essential fact, however, was that the pole had been sprung to the west and "buckled," to Leedon's knowledge, by the operation of stretching the messenger wire when it was first attached to the stub, and there was nothing to indicate this fact to plaintiff, and we think that as a reasonably prudent man, familiar with such work, Leedon ought to have known that the pole would spring back when released, and, as he had not observed or been advised that it had regained its natural position on the release of the clamp, he should have inferred that it was still held bent to the westward and "buckled" by some pressure on the cross-arm, and should have advised plaintiff of the danger that, when the cross-arm was removed, the pole might spring, and cause plaintiff a jar, imperiling his safety. The testimony for plaintiff shows that the top of the pole did spring to the eastward about two feet, so that when it thus regained its normal position the distance from the new pole at the top was substantially the same as at the bottom.

Counsel for the appellant argue with much cogency the incredibility of the testimony tending to show that, after the clamp was removed which held the messenger wire to the old pole, the pole should remain "buckled" and bent over to the westward with the messenger wire simply resting or

binding upon the top of the cross-arm, and contend that Leedon had no reason as a prudent man to assume any such situation. They claim, also, that it would have been impossible to pull the top of the pole over to the west to any such distance by the tightening of the messenger wire when first stretched, and that it was therefore equally impossible that the top of the pole could spring back to the eastward any such distance when the cross-arm was released, and they insist that this impossibility is demonstrated by the fact that, when the messenger wire was stretched, the pole had attached to it at least twenty-four wires coming from the east, which terminated on its cross-arms and were therefore wrapped around the insulators, which wires would have been broken by so great a bending of the pole to the westward, and that, when the cross-arm was taken off, there were at least six wires extending on to the west (which, by the way, had been strung after the stretching of the messenger wire, for all the wires had been broken by a sleet storm intervening between the time the messenger wire was stretched and the commencement of plaintiff's employment), which must have been broken by so great a spring of the pole to the eastward. It must be said, however, with reference to these wires extending westward at the time of the accident, that they did not terminate on the cross-arms of this pole, but were simply held to the insulators by short pieces of wire wrapped around them, so that it is not at all impossible that these wires should slip through the fastenings as the pole sprung to the eastward. However this may be, it is evident that these conditions and circumstances were for the jury to consider, in determining whether the accident happened as the evidence for plaintiff tended to show, and we are in no situation to say that it was impossible that the pole was so far buckled and bent westward by the stretching of the messenger wire and held in that situation, after the loosening of the clamp, by the pressure of the wire upon the cross-arm, that when released it should spring eastward and cause peril

to plaintiff. Nor are we prepared to say that Leedon, knowing that the pole had been "buckled" and sprung to the westward by the tightening of the messenger wire, should not have anticipated just what plaintiff testifies to have resulted when the pole was no longer held in tension by the messenger wire. What it is most difficult to account for is the fact that, after the loosening of the clamp, the pole should have still been held in tension by the pressure of the messenger wire on the cross-arm; but, the general danger involved in the release of the pole from the messenger wire being known to Leedon, we think he should have warned the plaintiff thereof, and should not have assumed that the danger was removed by the loosening of the clamp, in the absence of any information, by observation or otherwise, that the pole had resumed its normal position. This general danger was unknown to plaintiff, unless he is to be charged with knowledge thereof by reason of the fact that, on the day before the accident, he observed that the guy wires from the old pole to the "stub," which had been stretched before the stringing of the messenger wire, were loose, indicating the possibility that the messenger wire held attached to the stub, and there was nothing to indicate the pole bent further to the westward than it had been when first erected. But he knew nothing about these previous conditions, and we do not think that the mere slackness of the guy wires would be a sufficient warning to him that the pole was in tension by reason of the messenger wire.

The very difficulty which we have in determining what Leedon and plaintiff, respectively, ought to have assumed and anticipated in view of the knowledge which each had, makes it proper that we should abide by the conclusions of the jury. These questions were all properly referred to the jurors, and they were in as good a situation to reason about them and estimate the probability or possibility of any particular result and the credibility of the evidence as to what did cause the accident as we are. Indeed, they

were in a better situation from having heard the testimony of the witnesses. It is elementary that questions of doubt as to the facts are to be determined by the jury, and not by the appellate court.

Having thus indicated the issues of fact which were primarily for the determination of the jury, there is little occasion for amplification as to the rules of law applicable to the case. The substantial complaint for
2. INSTRUCTIONS: refusal
appellant is that the court erred in not taking the case from the jury on the evidence, and in not giving to the jury certain instructions asked for the appellant, which, if given, would almost necessarily, under the facts, have required a different verdict. No complaint is made of the instructions given, and the court could not have given those which were asked and refused without substantially deciding the case against the plaintiff on the testimony. As the evidence was, in our judgment, such as to sustain the verdict rendered, it was not error to refuse instructions which must necessarily have led to a different result.

There is no substantial conflict between the counsel for the two parties as to the law applicable to the issues of fact. Counsel for appellant cite cases in support of the proposition that the duty of the master to provide a
3. SAFE PLACE TO WORK: liability of master.
safe place has no application where the place becomes unsafe during the progress of the work. This is undoubtedly sound. See *Oleson v. Maple Grove Coal & Mining Co.*, 115 Iowa, 74; *American Bridge Co. v. Seeds*, 144 Fed. 605 (75 C. C. A. 407); *Bedford Belt R. Co. v. Brown*, 142 Ind. 659 (42 N. E. 359); *Holloran v. Union Iron & Foundry Co.*, 133 Mo. 470 (35 S. W. 260). But, in view of the preceding statement as to what the evidence tended to show, it is clear that the unsafety of the place where plaintiff was told to work did not arise by reason of his loosening the clamp and detaching the cross-arm, but by reason of a previous condition known to Leedon and not known to him, which rendered it unsafe for him to

do the thing he was directed to do. He did not cause the dangerous condition, but it already existed. With reference to assumption of risk, it is fundamental that a risk not known to the employé is not assumed, and it is unnecessary to explain the cases on which appellant relies. They are distinguished by a recognition of this elementary principle.

It is true, as contended for appellant, that the ordinary care required of the master does not involve the anticipation of every possible contingency which may happen, but only such as are likely to occur; but, if Leedon knew that the pole had been bent to the

4. SAFE PLACE TO
WORK: warn-
ing: care.

westward by the stretching of the messenger wire, he was bound to anticipate that it was likely to spring back when the wire was released, and he might reasonably have anticipated that plaintiff, suspended near the top of the pole by a safety strap, his feet pressed against it and supported only by the usual spurs, would be put in danger by the springing back of the pole to its normal position. Assuming that Leedon knew that the pole was held bent by the messenger wire, the result of its release was not one which he could not have reasonably anticipated. At any rate, the question was for the jury, and we cannot say that a reasonable man would not have anticipated the result.

On the whole record, we are satisfied that there is no occasion to interfere with the verdict and the judgment based thereon. The evidence that after the accident the top of the pole was nearly four feet away from the new pole, while it was only about two feet distant just before the accident, is too persuasive to justify our indulging in the assumption that it was impossible that the old pole could have been held so far bent over by the tension of the messenger wire on the cross-arm, and could have sprung back so far when that tension was removed, and we are satisfied that the question was one for the determination of the jury.

The judgment is *affirmed*.

W. A. WILLIAMSON, Executor, etc., Appellee, v. WILLIAM ROBINSON, Appellant.

Instruction: BURDEN OF PROOF. Under Code, section 3639, an instruction which casts upon a defendant the burden of proving all his defenses to an action, rather than any one of them, is erroneous.

Estate property: SETTLEMENT OF CONTROVERSIES. Conceding to an executor power to settle a controversy respecting estate property without an order of court, still he cannot delegate such power and through another effect a settlement binding upon the estate; nor can one of several heirs effect a settlement which will be binding upon the others.

Appeal from Jasper District Court.—HON. BYRON W. PRESTON, Judge.

FRIDAY, MAY 17, 1907.

ACTION at law by plaintiff as executor of the estate of S. D. Robinson, deceased, to recover the value of personal property belonging to the estate, and alleged to have been converted by defendant. From a verdict and judgment in favor of plaintiff, defendant appeals.—*Reversed and remanded.*

Harrah & Myers and *McElroy & Cox*, for appellant.

L. A. Wells, for appellee.

BISHOP, J.—The property in dispute consists of a team of mules, spoken of in the record as the “Hegwood mules,” a team of mules spoken of as the “Dalton mules,” and a jack. Defendant admits his possession of the property, and that he has refused to surrender the same to plaintiff. The defense pleaded is that the deceased, S. D. Rob-

inson, and the defendant were father and son, respectively; that in June, 1902, the father, then still living, proposed to make an advancement out of his property to defendant in the sum of \$3,500, the same to be taken by defendant as the full measure of his interest in his father's estate; that a meeting followed, at which all matters of account growing out of previous dealings between them were adjusted, several items of personal property, including the mules in question, were agreed to be turned over to defendant at a fixed valuation, and the balance of the \$3,500, ascertained to be \$2,671.87, was agreed to be paid in cash. It is further pleaded that at the same time and in the same connection the jack in question was presented to defendant as a gift by his father. Defendant says that, pursuant to said settlement and arrangement, his father executed and delivered to him a bill of sale in writing for said personal property, and paid to him in money the said sum of \$2,671.87; that he (defendant) took immediate possession of the Dalton mules and the jack, but not of the Hegwood mules. As to the latter, it is pleaded that they were at the time in possession of one Hegwood, and it was agreed between defendant and his father that they should be allowed to remain as they were until fall, "and, if his father in the meantime could get a better price for them than agreed upon by them, then his father was to have the benefit of such increase." It is said that no purchaser was found, and after the death of his father defendant demanded possession of the mules of Hegwood, which was refused. And defendant says that thereupon, and after negotiations with said Hegwood and the widow of the deceased, acting for herself and as agent of all the legatees under the will of the deceased, and with full knowledge and consent on the part of plaintiff, executor, entered into a settlement to avoid litigation whereby the mules were delivered into the possession of defendant; that there was paid by defendant to Hegwood \$10 due him for the care of the mules, and there was given to said widow by

defendant a horse of the value of \$50. Said settlement is pleaded in estoppel. All of the allegations of the answer are denied in a reply.

I. Complaint is made of numerous rulings made in connection with the introduction of the evidence. We have examined the record in respect of each of such rulings and find no prejudicial error. So, also, complaint is made of the refusal of the court to give instructions to the jury as requested. We have examined as to these, and find that, as far as correct in law and applicable to the case, they were embodied in the charge given by the court. Accordingly there was no error.

II. In the second instruction given, the jury was told that the burden was upon defendant to prove the affirmative allegations of his answer; that is, the settlement with his father, the sale or gift to him of the property

1. INSTRUCTION:
burden of
proof.

in controversy, and the execution and delivery of a bill of sale therefor. This instruction is complained of, and the burden of the contention is that an unnecessary requirement was thereby put upon defendant, in that he was compelled to go farther in proof than was necessary to sustain his defense. And the argument is that under the provisions of Code, section 3639, he was only required to make proof of one defense, although in his answer he may have alleged several. This contention, we think, must be sustained. The gist of defendant's answer respecting the mules is that a transfer of title thereto was made to him by his father on sufficient consideration, and that the transfer was accompanied by a change in possession — the delivery of the Dalton mules being actual, and the delivery of the Hegwood mules being constructive. We are not called upon in this connection to consider the effect of the agreement pleaded under which the Hegwood mules were to remain as they were until fall. As to the jack, the contention is for a transfer of title under gift executed by delivery of possession. Here, then, were the separate defenses of pur-

chase as to the mules and of gift as to the jack. And it was possible for plaintiff to succeed on proof of the purchase, although he might fail in proof of the gift, and vice versa. It is true that defendant pleaded the execution and delivery of a bill of sale in evidence of both the sale and the gift. But a bill of sale is no more than evidence, and it was possible for defendant to succeed on proof of the bill of sale, or in virtue of evidence *aliunde*. His case was made out from which ever source came the evidence. And it is not to be charged against him that he alleged more than was necessary to sustain his defense of ownership. A party litigant will not be deemed to have failed simply because he has not gone beyond the limit of the proof required in law to establish his case. This is no more than to say that a party is not required to prove the unnecessary averments of his pleading. *Knapp v. Cowell*, 77 Iowa, 528; *Schrader v. Hoover*, 80 Iowa, 243. It follows from what we have said that the instruction complained of must be condemned as error; and, without setting them forth, we may add that the error was not overcome by the other instructions given.

III. In view of a further trial of the case, one other instruction complained of may be noticed. In the course of the charge the court withdrew from the consideration of

2. ESTATE PROP-
ERTY: settle-
ment of con-
troversies.

the jury the matter of the settlement alleged in the answer to have been had by defendant with plaintiff and the widow of the deceased respecting the Hegwood mules. Looking into the evidence, these are the facts on defendant's own showing. He says that he went to plaintiff, executor, and asked "if I had a right to settle with the widow, and he said I had, and that anything she and I did would be all right with him; that he did not want to have any trouble about it." And he says that thereupon he went to the widow and proposed to give her a pony for the use of her boy, and to settle with Hegwood for the amount claimed by him, if she would relinquish her claim on the mules, and to this she consented;

that he delivered to her the pony, and then went to Hegwood and paid him and took the mules. It is not pretended in the evidence that the widow had any authority to act for the other legatees in the will. Even if the executor had power, in the absence of an order of court granting authority, to settle a matter in controversy respecting the property of the estate in his charge, still he could not bind the estate by any delegation of that power. And, should we concede that all persons interested in an estate could get together and by mutual agreement make a disposition of all or any portion of the assets thereof, still on plainest principles the act of one of such interested persons acting alone could not be recognized as having any validity.

For the error in the second instruction given, as we have pointed it out, there must be a new trial, and the case will be remanded for that purpose.—*Reversed.*

THE SCHOOL TOWNSHIP OF BLOOMFIELD, etc., Appellant, v.
THE INDEPENDENT SCHOOL DISTRICT OF CASTALIA, etc.,
ET AL., Appellees.

134	349
142	12

Schools: FORMATION OF DISTRICT. Under Code, section 2794, an
1 independent school district may be formed from territory formerly composing two or more independent districts or an independent district and a school township, without a concurrence of the boards of the districts out of which the new corporation is formed.

Judgments: CONCLUSIVENESS: IDENTITY OF PARTIES. A school town-
2 ship having once litigated to final judgment its rights as against an independent district cannot relitigate the same rights by the simple expedient of bringing into the second action as defendants members of the board of directors who are not necessary parties.

Same: MATTERS CONCLUDED. Where the judgment in a former ac-
3 tion between the same school district of necessity involved a finding that a notice of election was sufficient, further inquiry into the sufficiency of the notice in a subsequent action is precluded.

Appeal from Winneshiek District Court.—HON. L. E. FELLOWS, Judge.

FRIDAY, MAY 17, 1907.

ACTION to set aside and declare void proceedings by which an independent school district was attempted to be formed, and for an injunction. The action having been heard on its merits, the petition of plaintiff was dismissed, and there was judgment in favor of defendants for costs. Plaintiff appeals.—*Affirmed.*

John B. Kaye, for appellant.

F. S. Burling, for appellees.

BISHOP, J.—The plaintiff school township and the defendant school district are alleged to be school corporations in Winneshiek county. The individual defendants, George Allen et al., are alleged to be acting as directors and officers of a pretended school corporation styled the “New Independent School District of Castalia,” in said county. A recital of the matters and events leading up to this litigation will aid in bringing out with clearness the points in controversy. Up to the year 1882 the school township of Bloomfield included all of the civil township of Bloomfield in said county. In that year there was organized the Independent School District of Castalia, which included the lands within the territorial limits of the village of Castalia in said township, and considerable territory outside thereof—in all two thousand and forty acres of land. As formed, the independent district was wholly within the township. It was very irregular in shape, being of the extreme length at one point of three and three-quarters miles, north and south, and, at one point, no more than one-quarter of a mile in width. In the year 1901 Castalia became incorporated as a town under the statute, and, as laid out, the corporate limits in-

cluded five hundred and sixty acres of the lands within the independent district and eight hundred acres lying without such district. The inhabitants of the town as thus incorporated numbered about two hundred, nearly all of whom resided within the limits of the independent district. With the qualification hereinafter to be referred to, matters stood in this condition until April 30, 1904, when, relying upon the provisions of section 2794, Code Supp., a petition was presented to the board of the independent district looking to the establishment of a new independent district, which, in addition to all of the territory within the corporate limits of the town of Castalia, should include the major portion of the territory embraced within the limits of the old independent district, and considerable new territory adjoining the said town, being territory at the time and theretofore a part of the plaintiff school township. Acting upon such petition the board proceeded to establish a new district in accordance with such petition. Notice was given and an election was held at which the formation of the new district was approved by a majority of those electors who appeared and voted on the proposition. A meeting followed at which the defendants Allen et al. were elected directors, and they organized as a board and assumed charge of the affairs of the new district. This action was brought to have the proceedings, of which recitation has thus been made, declared void and of no effect.

I. The primary contention of appellant is that, in view of the situation as it existed, there was no authority of law to proceed to the formation of a new independent district.

1. SCHOOLS: formation of district.

which should include territory theretofore a part of the school township; that, at most, a change of boundary line as authorized by section 2793a, Code Supp., was possible of accomplishment. It is possible that a determination of the question thus made is unnecessary in view of our conclusion on the matter discussed in the following division of this opinion. As the

controversy, however, is not one between individuals asserting private rights, but has relation to the rights and powers of school corporations and the officers thereof, we think it appropriate to make pronouncement on the subject. We shall proceed, therefore, to dispose of the question, and this we may do without stopping to question the right of plaintiff to sue. Prior to the sitting of the Twenty-Seventh General Assembly there was no provision of statute authorizing a change in the boundary lines between a school township and an independent city or town district. Code, section 2793, as theretofore existing, went no farther than to provide for a change of lines between contiguous independent districts. The General Assembly mentioned passed an act supplementary to section 2793, which act is now known as section 2793a, Code Supp., wherein it is provided that, when the boundary line between a school township and an independent city or town district is not also the line between civil townships, such boundary may be changed at any time by the concurrence of the board of directors. The plain effect of these provisions of statute is to authorize adjoining school corporations, each being independent, or one independent, and the other a school township, acting as such, through their respective boards of directors, to accomplish a change by agreement in corporate boundary limits. That the plaintiff school township and the old independent district might have thus proceeded in their corporate capacity is probably not open to doubt.

But it does not follow that a change in boundary lines may not be accomplished in any other way than by joint corporate action. Section 2794 of the Code, which, as we have seen, was proceeded under in the present instance, provides, in substance, that, upon the written petition of any ten voters of a town of over one hundred residents to the board of the school corporation in which the portion of the town plat having the largest number of voters is situated, such board shall establish the boundaries of a proposed inde-

pendent district, including therein all of the town, and also such contiguous territory in the same or any adjoining school corporations as may be authorized by a written petition of a majority of the resident electors of the contiguous territory proposed to be so included in said district, and as may best subserve the conveniences of the people for school purposes. It is then provided that an election shall be held to ratify or reject the new district as proposed. Here it will be observed the right to institute proceedings and bring about a change is with the electors, and it does not matter that some are residents within the territorial limits of one school corporation, and some of one or more others. So, too, the right is altogether imperative as it is arbitrary. The school board to whom the petition is addressed has no alternative but to proceed in accordance with the petition, and follow the lines marked out by the statute. *Munn v. School Twp.*, 110 Iowa, 652. It is conceded in this case that petitions proper in form and properly signed were presented to the proper board as directed by the statute. It accordingly follows that the contention of appellant, thus considered, must be dismissed as without merit.

II. By way of a further matter of complaint, the petition alleges that the election attempted to be held was void for that no sufficient notice thereof was given as required

2. JUDGMENTS: by law; the particular defect complained of
conclusive- being that the notice given did not designate
ness: identity the place of meeting for the election. Con-
of parties.

ceding that under authority of *School Twn. v. Wiggins*, 122 Iowa, 602, plaintiff's right to sue in equity could not be questioned if the proceedings under which the new district was attempted to be formed were wholly void, still, in view of an issue made in answer, and of the proofs presented having relation thereto, we think that plaintiff is in no position to insist upon the irregularity or defect as now alleged and complained of. In a separate count of the answer the allegation is made that the movement looking to

the formation of a new independent district was inaugurated in March, 1904; that, proceeding under Code, section 2794, a petition was then presented to the board of the old independent district of Castalia, in which petition there was included and described substantially all the territory included and described in the later petition of April 30, 1904, being the petition on which the proceedings complained of in this action were founded. And the answer alleges that the board, acting upon such March petition, gave notice of an election as required by law; that an election was held resulting favorably to the creation of a new independent district. The allegation follows that, on such election being held, the district township, plaintiff in this action, commenced an action in equity against the Independent District of Castalia, principal defendant in this action, to have such election, and the proceedings leading up to the same, declared void, for the reasons that such proceedings were not only irregular and defective but unwarranted in law. Continuing, the answer says that the defendant independent district appeared in that action and answered, and a copy of the answer so filed is set out. It appears that the filing of such answer did not take place until after the election was held under and pursuant to the electors' petition to the board of date April 30th. As disclosed, such answer, in the first count thereof, admitted that the proceedings had and done under the March petition were irregular and defective, and hence null and void; that on account thereof such proceedings had been wholly abandoned. In a second count of such answer the defendant pleaded the proceedings inaugurated April 30, 1904, upon which the present action is founded, including the petition to the defendant board, the order of the board fixing the boundaries of the new independent district, the giving of the notice of the election, being the notice complained of in this action as defective, the holding of an election, etc. It is further pleaded in the present answer that in such former action the plaintiff filed a reply, a copy

of which is also set forth. Therein was admitted the proceedings dating from April 30, 1904, but it was alleged that all such arose after the commencement of that action, and the legal sufficiency of such matters to constitute a defense to that action was denied. The present answer then makes allegation that such former action was submitted to the court, and resulted in plaintiff's petition being dismissed, but with taxation of costs against defendant. And defendants say that in view of said former action, and the disposition thereof, all the issues tendered by plaintiff in its petition in the present action have been finally adjudicated on merits, and that plaintiff has no further right to sue.

Defendants made proof of the pleadings and proceedings in such former action, and the sufficiency thereof as constituting a bar to the present action is, therefore, a question squarely before the court. On familiar doctrine, that a judgment or decree may have effect to work a bar to any future suit, it must appear that such suit was between the same parties or their privies, involved the same cause of action, and was on merits. *Madison v. Coal Co.*, 114 Iowa, 56. Now, clearly enough, the parties to the former suit, and the real parties in interest to the present suit, are identical. It is true that in the present suit the individual members of the board of the defendant district, and who as it appears were chosen to be the directors of the new independent district, are added as defendants. But here, as in the former suit, the issue is between the district township on the one hand and the independent district on the other hand. The directors named can have no individual interest, and it is manifest that they were brought in for no other purpose than to charge them with personal knowledge of the controversy, and of the decree to be entered whereby the rights as between the two corporations should be fixed and determined. Such being the situation, there is no variance in the identity of the parties. Surely the district township, having once litigated to final judgment its rights as against the inde-

pendent district, could not thereafter put itself in position to relitigate such rights by adopting the simple expedient of bringing in as additional parties defendant persons having no personal interest in the subject-matters in controversy, and hence not necessary, although proper, parties. *Davis v. Milburn*, 4 Iowa, 249; *Larum v. Wilmer*, 35 Iowa, 244. Should the reader care to pursue the subject further, he will find the cases on the subject generously collected in 23 Cyc. 1112; Am. & Eng. Ency.

That the issues arising from the pleadings in the former action were identical with those presented by the present action is not open to doubt. What there is of distinction has relation to matter of form, and not of substance. There the answer in an affirmative way pleaded the legality and sufficiency of the proceedings under the April petition, and this was put in issue by the reply. Here the petition challenges the legality and sufficiency of such proceedings, and this is put in issue by the answer. It is true that in the former action the matter of the failure to designate in the notice of election the particular place at which such election was to be held was not pointed out by specific al-

8. SAME: matters concluded.

legation. But the challenge was to the validity of the proceedings as a whole, and of necessity it included the question of the sufficiency of the notice. And, as a finding that the notice was sufficient was necessary to the judgment entered, the estoppel of such judgment must be held to forbid any further inquiry into the subject. "Matters which follow by necessary and inevitable inference from the judgment, findings or determinations of the court in relation to the subject-matter of the suit which are necessarily implied from its final decision as being determinations which it must have made in order to justify the judgment as rendered, are equally covered by the estoppel as if they were specifically found in so many words." 23 Cyc. 1306; *Hornish v. Stove Co.*, 116 Iowa,

1; *Brant v. Plumer*, 64 Iowa, 33; *Ostby v. Secor*, (Iowa), (not officially reported), 94 N. W. 571.

As we have seen, the former action was regularly submitted to the court to determine the merits of the matter in controversy, and that the result of this was a dismissal of the petition. There was then a final judgment within the meaning of the law, and as such it became conclusive. *Campbell v. Ayres*, 18 Iowa, 252; *Scully v. Railroad*, 46 Iowa, 528.

III. We need not concern ourselves about whether or not proper steps were taken to organize the new district by the election of directors, etc. The proposition to establish such new district having carried, the organization thereof could not be matter of moment to plaintiff.

IV. One other matter of contention remains to be noticed. It appears that two hundred and forty acres embraced within the limits of the old independent district was not included in the organization of the new. This could not affect the validity of the organization of such new district; and, in any event, it was a matter of no moment to plaintiff. We need not concern ourselves, therefore, to determine the status of such omitted lands. That is matter, in the first instance at least, for the school authorities.

We find no error in the judgment, and it is *affirmed*.

JOHN PIER, Appellant, v. GEORGE SALOT, Appellee.

Party walls: LIMITATION OF ACTIONS. Where an adjoining owner
1 makes use of a party wall erected by his neighbor he becomes at once liable to pay his proportion of the value of the wall, and a right of action in favor of either party, growing out of the construction or use of the wall, is barred in five years, under the general statute of limitations relating to injuries to real property.

Same. Where there is neither pleading nor proof that an adjoining owner concealed his use of a party wall the defense
2 of limitations to an action for contribution is not overcome.

Same. Where an adjoining owner becomes liable for his proportionate value of a party wall, by attaching his building thereto, the fact that he fails to use a chimney in the wall until a latter date will not toll the statute.

Same. The fact that one party in seeking to enjoin the adjacent owner from closing a chimney in a party wall, is proceeding on the theory that his use of the wall has not been such as to render him liable for a proportionate value thereof, does not affect his right to rely on the statute of limitations as a defense to a claim against him for contribution.

Same: DECREE. When the roof of a building is built against a party wall in such manner as to form a gutter liable to become out of repair, to the injury of the adjacent owner, the decree defining the rights of the parties should require the gutter to be kept in repair.

On rehearing. Former opinion modified, and judgment below reversed.

FRIDAY, MAY 17, 1907.

ACTION in equity to enjoin defendant from closing the chimneys in a partition wall. The defendant answered in denial and by cross-petition alleged that the partition wall had been erected by himself, and that plaintiff had made use of it without paying therefor, for which he asked an accounting. He also pleaded a counterclaim for damage done to his wall by reason of plaintiff's negligence in erecting and maintaining a roof on his own building, which cast the water falling thereon against said wall. Plaintiff denied the cross-demand, and pleaded the statute of limitations. The trial court found for the defendant against plaintiff for one-half the value of the wall, but denied the counterclaim for damages. Both parties appeal; but the plaintiff, having first perfected his, will be spoken of in this opinion as appellant.

Longueville & Kintzinger, for appellant.

Wm. Graham and Harry F. Salot, for appellee.

WEAVER, C. J.—Plaintiff and defendant have for many years owned adjoining lots in the city of Dubuque. Prior to the year 1888, plaintiff had erected and maintained on his lot a two-story frame building, the porch of which extended to or very near the division line between the respective premises. In the year named defendant improved his lot by erecting a brick building covering the full width of the same. The partition wall, eighteen inches in thickness in the cellar and twelve inches in thickness in the superstructure, was laid one-half either side of the partition line. To accommodate this structure, some six inches of the outer edge of plaintiff's porch was sawed off. The parties appear to have then been on amicable terms, and, at the request of plaintiff, defendant constructed two chimneys in the wall, projecting in part outside of the body of the wall into plaintiff's lot, the flues being all or nearly all, on plaintiff's side of the true partition line. Plaintiff paid the extra expense caused by the construction of the chimneys. Soon after defendant had finished his brick building plaintiff extended the roof of his frame building out to the brick wall, and inclosed the porch, thus availing himself, to the extent indicated, of the use of the wall. He also cut openings in the chimneys above mentioned, and began the use thereof. In the year 1889 plaintiff extended the brick party wall some distance to the rear in connection with a building or addition erected on his premises, and soon thereafter defendant extended his porch on the rear of his building, making use of a part of the extended wall above described. For the one-half of this wall plaintiff also asks to recover from defendant, and the trial court made an allowance therefor.

I. Assuming that the parties have each made such use of a party wall erected by the other as to subject them to an accounting therefor—a question we need not here discuss—the inquiry at once arises under the pleadings and evidence whether the right of action on such claims has been barred

1. PARTY WALLS:
limitation of
actions.

by the statute of limitations. If this is to be answered in the affirmative, it will dispose of the principal issue in the case without need of further investigation. The record indicates that the act of the plaintiff in extending his building to the party wall, and thus inclosing his porch, was done in 1888, and the act of defendant in building his rear porch against plaintiff's wall was done in 1889. This action was begun on January 15, 1903. When did the right of action, if any, accrue? The party-wall statute, Code, section 2995, provides that if one of the adjoining owners builds the wall at his own expense, the other may make it a wall in common by paying the one who erected it one-half of its appraised value at the time of using it. The general statute of limitations (Code, section 3447) provides that actions founded on unwritten contracts, and those brought for injuries to property, and all other actions not otherwise provided for in this respect, may be begun at any time within five years after their cause accrues; and as there appears to be no special limitation provided for actions of this nature, the general statutory rule just cited must be held applicable. We have then to inquire when, if ever, the right of action accrued upon the claim and counterclaim made in this case.

As early as the year 1856 this court, construing the party-wall statute as it then existed, said that it was simply declaratory of the common law, and held that a lot owner, making use of a party wall to the erection of which he had not contributed, was not liable as a trespasser; but he could not gratuitously appropriate such wall, and when he did build into it, or make use of it as a party wall, he became liable to the builder of the wall for contribution. *Zugenbuhler v. Gillium*, 3 Iowa, 391. The effect of this holding would seem to be that whenever the adjoining owner makes use of a party wall erected by his neighbor he becomes liable at once as upon an implied promise or statutory obligation to pay his just proportion of the value of such wall. In *Wickersham v. Orr*, 9 Iowa, 253, and again in *Swift v. Calnan*, 102 Iowa,

206, action was brought to recover upon the oral agreement of one lot owner to pay the other one-half the value of a party wall whenever the promisors should make use of it. In each case it was contended in defense that the proof of the oral agreement was incompetent under Code, section 3003, which provides that all special agreements concerning party walls must be in writing; but the objection was overruled on the ground that the oral contract was identical with the one which the law makes for the parties. In other words, according to the precedents, the law implies or creates an obligation to pay whenever the adjoining owner undertakes to avail himself of the benefits of the party wall as such. The cases of *Deere v. Weir*, 91 Iowa, 422; *Molony v. Dixon*, 65 Iowa, 136; *Monroe Lodge v. Bank*, 112 Iowa, 487, and *Howell v. Goss*, 128 Iowa, 569, all recognize the soundness of this proposition. In the *Howell* case we said of a party wishing to make use of a wall erected by his neighbor that "as soon as he desires to advantage himself of the new wall by carrying his building further up, he must pay his proportion of the appraised value of raising it." In the *Molony* case, counsel for the defendant having argued that the latter's liability for using a party wall to which he had not contributed was in the nature of damages for trespass, we disposed of the objection by saying that, conceding such to be the case, it was the privilege of the plaintiff to waive the trespass and sue, "on the implied agreement." We further held in the same case that, although the statute makes the party appropriating the use of a wall built by another liable for one-half its "appraised value," such appraisement is not a condition precedent to a right of action by the latter.

We conclude, therefore, from the plain reading of the statute, and from the manner in which it has been heretofore construed and applied by us, that a right of action to the plaintiff upon his claim, and to defendant upon his counterclaim for payment for one-half the value of the wall built by them, respectively, accrued not later than the year

1889, and is therefore barred by the statute of limitations. The decision in *Crapo, Executor, v. Cameron*, 61 Iowa, 447, may at first blush seem inconsistent with this view, but an examination of that case will demonstrate its entire harmony with our views as expressed in the other cases above cited. In that case one Armstrong, plaintiff's testate, erected a building on his lot in the city of Burlington, placing the wall on what he assumed to be the line, and paying the entire expense. The owner of the adjoining vacant lot leased it for a term of years to tenants, who erected a building thereon, making use of the division wall under an agreement by which they paid wall rent of \$40 a year to the owner of the Armstrong building. Thereafter, the lease of the lot having expired, Cameron, the owner of the lot, purchased the building which had been erected by the tenant, and for the first time became owner of the entire property, and leased it to one Washurn, who continued to pay the wall rent, but was credited with the amount of such rent in his settlement with Cameron. After a time Cameron, claiming to have discovered that the entire wall stood on his lot, refused to pay further wall rent. Action was brought to recover such rent, but by amendment recovery was finally sought for the value of half of the wall. To this demand the statute of limitations was pleaded. Under these circumstances we held that by taking a lease of the wall the defendant's tenants recognized plaintiff's rights therein, and defendant, having continued or authorized the continued payment of such rent after he had purchased the building, the right of action against him did not accrue until he repudiated the lease and refused to pay rent.

The builder of the wall has the right to insist upon the payment of one-half its value immediately upon its appropriation by the other party. Indeed there is no good reason apparent why the owner may not object at the very outset, and by injunction prevent the use of the wall by his neighbor altogether until payment therefor is made. *Crapo v.*

Cameron, supra; Molony v. Dixon, supra. But if the neighbor is unprepared to pay such value immediately, and prefers for the time being to pay rent for such use, and the parties agree upon such an arrangement for a month, a year, or a series of years, why is not the right of action for the value of the wall suspended pending the expiration of such agreement? Such, at least, was our conclusion in the case referred to; but the rule there laid down is not applicable here, because there is no pretense of any arrangement or agreement between the parties other than such as the law implies, and had the suit been begun immediately upon the act of the plaintiff in extending his building to the party wall, or upon the act of the defendant in erecting his porch against the wall built by plaintiff, it certainly could not have been abated as having been prematurely brought. If suit could have been brought then, when and how has the right ever been suspended, or how has the statute been tolled? If, under the doctrine of the *Crapo* case, some denial by one party of the other's rights in the wall was necessary to set the statute in motion, such denial is found in the very act by which one of them attaches his building to the wall erected by the other. In another branch of this same *Crapo* case it was held that, although the wall had been built over the line so as to rest almost its entire width on the defendant's lot by mistake of the builder as to the true location of such line, nevertheless the act of the plaintiff's grantor in erecting the wall was in itself such an assertion of right as would ripen into a perfect title in ten years. Certainly the act of one owner in extending a party wall too far over the lot line is not a more unequivocal assertion of a hostile right than is the act of the other party in assuming possession and use of one-half of such wall to which he had contributed nothing, and if one is sufficient to set the statute in motion, we think it equally clear the other will have the same effect.

Counsel for appellee suggest in argument that plaintiff

concealed his use of the wall, and is therefore not in position to insist upon the limitations. The pleadings

3. SAME. present no such issue, and if they did there is not any testimony in the record to justify such a conclusion.

So, too, the claim made that plaintiff did not use one of the chimneys in the wall until within a recent period is unavailing. If the inclosure of plaintiff's building and attaching it to the party wall rendered him liable to

3. SAME. pay one-half its value, and such is the theory of defendant's counterclaim, the fact that plaintiff did not use one of the chimney flues within the inclosed wall until a later date would not furnish a new cause of action, nor set the statute running anew.

We may say, also, that the fact that, in beginning his action plaintiff held to the theory that his use of the wall was not such as to render him liable under the party-wall statute,

4. SAME. cannot affect his right to rely upon the statute of limitations as against the defendant's counterclaim. As to the counterclaim, he is a defendant, and as such may deny that any liability ever attached to him in the premises, and at the same time insist that if such liability did attach, action to enforce it is barred by the statute of limitations. The conclusion we have indicated is equally fatal to plaintiff's claim and defendant's counterclaim, so far as they seek to recover damages for the use or appropriation of the party wall. As the effect of this is to affirm the plaintiff's right to the continued use of the wall, defendant should be enjoined against interfering with that use, and against obstructing the chimneys.

II. As to defendant's counterclaim for damages on account of plaintiff's roof, the record is insufficient to sustain a finding in his favor. It is to be said, however, that

5. SAME: decree. the roof of plaintiff's building is built against the party wall, which is flashed with tin, forming a gutter which is liable to get out of repair to the injury of the defendant. The final decree should require plaintiff

to keep this gutter in repair, and clear of accumulations of ice, snow, or other materials which are likely to cause the water to overflow the flashing and soak into or through the wall.

The decree of the district court will be reversed on plaintiff's appeal, and cause remanded, with directions to enter a decree in harmony with this opinion.— *Reversed.*

F. P. SARGENT, Appellant, v. CARL N. OWEN ET AL., Appellees.

Intoxicating liquors: NUISANCE: EVIDENCE: REVIEW. Where the evidence in an action to restrain a liquor nuisance is in irreconcilable conflict on the question of illegal sales, the judgment of the lower court, having the opportunity to observe the demeanor of the witnesses while testifying, will not be disturbed on appeal.

Appeal from Linn District Court.—HON. W. G. THOMPSON, Judge.

FRIDAY, MAY 17, 1907.

ACTION in equity for an injunction to restrain the maintenance of an intoxicating liquor nuisance. On final hearing the petition of plaintiff was dismissed, and from such final order and judgment he appeals.— *Affirmed.*

Charles W. Kepler & Son, for appellant.

Smith & Smith, F. L. Anderson, and C. S. Lake, for appellees.

BISHOP, J.—The defendant Owen is a registered pharmacist doing business at Marion, Linn county, and the holder of a permit to keep and sell intoxicating liquors for lawful purposes. The defendant Kendall is the owner of the building in which such business is conducted. The abstract

prepared by plaintiff shows that an original petition for injunction was filed January 23, 1905, and to this petition the defendants answered January 27, 1905. On the date last named the case came on for hearing on the demand, as contained in the petition, for a temporary writ of injunction. Plaintiff was not ready to proceed, and the case was continued at his costs to the April term. For reasons which do not appear, the case was not heard at the April term, and on July 5, 1905, plaintiff filed an amended and substituted petition, charging in general terms the maintenance of an intoxicating liquor nuisance, and the sale of such liquors to Lottie Carr and others. Therein a temporary writ and a decree of permanent injunction was prayed for. This petition was presented to Judge Thompson, and July 10, 1905, was fixed by him as the day for hearing the application for temporary writ. The record makes it appear that, owing to the illness of one of defendant's counsel, the hearing was postponed until July 15, 1905. Whether this postponement was on order of the judge, or by agreement of the parties, does not appear. Whatever may be the fact as to this, it is certain that no objections were made or exceptions taken. Nor was there any request that a temporary writ issue as of course under the statute. On July 15th the defendants appeared, and in answer denied generally. Further, they pointed out the application of plaintiff as made in January, and insisted that plaintiff, having abandoned the same, and suffering judgment for intermediate costs, his right to a temporary writ of injunction became completely adjudicated; that, having renounced his January application, plaintiff was estopped from again applying for a temporary writ. Following this, and without objection or exception, or request for temporary writ as of course, the application was again continued until August 14, 1905, when, upon hearing, the application for a temporary writ was denied, and the main case was set down for hearing at the following September, 1905, term of the court. At the September term, the

case was tried on its merits, resulting in a dismissal of the petition.

The appeal is from the final judgment only, and all the questions presented in argument are addressed to the correctness thereof. Just why the record in this court should be burdened by a recital of all the matters occurring in connection with the application for a temporary writ is not altogether clear. There would seem to be no relation between such matters and any legitimate question in the case which we are called upon to consider and in respect thereof make pronouncement. If such matters are brought up as a basis upon which to predicate the attack made in the course of argument by counsel for plaintiff — whom we recognize as able lawyers, and experienced in practice — on the judicial integrity and worthiness of motive of the judge presiding in the court below, we have no more to say than that the attack is quite as unbecoming to counsel as it would seem to be unwarranted by anything that is made to appear on the face of the record.

Looking into the merits of the case as presented by the record made on final hearing, it is to be said that the testimony centered almost wholly on the character of the person Lottie Carr, named in the petition, and the relation between her and defendant, as purchaser, on the one hand, and seller, on the other hand, of intoxicating liquors. That the woman was an habitual drunkard we think may be said to have been fairly established by the evidence; but, on the question whether defendant supplied her with intoxicants, the evidence is in direct conflict. And this conflict cannot be reconciled. The witnesses on one side or the other of the question consciously committed perjury. Now, the presiding judge of the court below had these witnesses before him, he listened to their respective stories at first hand, and had opportunity to observe their appearance and their demeanor while testifying. In such a case, unless the demands of the printed record are imperative, we should not set up our judgment

as to the truth of the facts in controversy in opposition to the judgment of the court below. It may be that in refusing to believe the testimony of the woman Carr and her brother, to the effect that they bought whiskey of the defendant, the court did them an injustice; but it might be equally as unjust for us to refuse to believe the defendant and his clerk, wherein they state with great positiveness that neither Mrs. Carr or her brother ever bought any liquor in the store. In such a case, it is quite appropriate that we yield to the court below superiority of judgment, and we shall do so in this case.

Carrying this thought to a conclusion, we agree that the judgment should be, and it is *affirmed*.

THE AULTMAN ENGINE & THRESHER COMPANY, Appellant,
v. W. F. GREENLEE and MRS. W. F. GREENLEE, Ap-
pellees.

Fraudulent conveyances: HUSBAND AND WIFE. Although an oral
1 contract of the husband to convey land to his wife could not
have been enforced because of indefiniteness, yet if it has been
carried out the creditors of the parties can not set the convey-
ance aside on the ground of vagueness in the original agree-
ment.

Same: ASSIGNMENT OF INHERITANCE. The contract of the husband
2 to assign his prospective inheritance to his wife cannot be
annulled by his creditors on the ground of fraud, after the
same has been performed in good faith and for a consideration.

Same: TRANSACTIONS BETWEEN HUSBAND AND WIFE. While both
3 husband and wife are liable for family necessities, yet the
wife may refuse to expend her professional earnings for that
purpose except upon an agreement of the husband to repay
her, and if such an agreement is in good faith made and there-
after carried out it is not voidable at the suit of the husband's
creditors.

Deeds: CONSIDERATION: PAROL EVIDENCE OF. The real considera-
4 tion for a deed from a husband to his wife may be shown by
parol, where creditors of the husband are seeking to set the
same aside as fraudulent.

Appeal from Benton District Court.—HON. OBED CASWELL,
Judge.

FRIDAY, MAY 17, 1907.

ACTION in equity in the nature of a creditors' bill. Petition dismissed, and plaintiff appeals.—*Affirmed.*

C. Nichols and *C. W. E. Snyder*, for appellant.

Montgomery & Chambers and *Whipple & Brown*, for appellees.

WEAVER, C. J.—In the year 1902 one Allen Greenlee, being seised of certain lands in Benton county, Iowa, died intestate, and by the terms of his will one-twelfth part of said lands was devised to his son, W. F. Greenlee, subject to a charge or lien of \$350. Thereafter, on November 28, 1903, W. F. Greenlee conveyed all his right, title and interest in said lands by warranty deed to his wife, Ella M. Greenlee, in whom the title still stands. About March 1, 1905, the plaintiff recovered a judgment against the said W. F. Greenlee in the district court of Benton county for several hundred dollars upon a claim antedating the conveyance aforesaid. An execution upon said judgment being returned unsatisfied, this action was begun alleging that the conveyance by Greenlee to his wife was in fraud of his creditors, and asking to subject said lands to the payment of the judgment. To this claim the defendants answering separately deny the alleged fraud, and aver that said conveyance was made in payment of a bona fide indebtedness and pursuant to an agreement entered into in good faith long before the date of its execution and delivery, and before the origin of the debt to the plaintiff. A question of homestead rights is also raised by the answer. The wife also, by cross-petition, asks to have the title of the land quieted in her. The trial

court found the equities to be with the defendants and dismissed the bill.

The principal issue is one of fact, and possesses no such unusual features as to call for an extended discussion of the evidence. It appears that at the date of their marriage neither the husband nor wife had property or money to any considerable amount. The wife is shown, however, to have been a music teacher of experience, who was capable of earning and did, in fact, earn a considerable income, while the husband seems not to have been very prosperous. It is the claim of the defendants, and the evidence tends to show, that in 1897, and before the debt to plaintiff was contracted, the husband and wife entered into an agreement by which she undertook to lend him sums of money from time to time and to invest other of her earnings in payment of bills contracted for the support of the family in consideration of his promise to turn over or convey to her whatever share or interest he might thereafter receive from the estate of his father on the latter's decease. According to her testimony, she thereafter loaned to her husband and expended for him under said agreement money to the aggregate amount of \$971, in consideration of which he made to her the deed in question in accordance with his promise. The testimony of the husband and wife is quite direct and consistent with the truth of this claim, and it finds some support and corroboration in other circumstances, which we do not stop here to relate. The points made for a reversal of the decree below are as follows:

I. That the terms of the alleged agreement between the defendants are too indefinite to be upheld as a contract. It may be that, if this were an action by the wife to enforce

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| <p>1. FRAUDULENT
CONVEYANCES:
husband and
wife.</p> | <p>a specific performance of the agreement, this objection would be available, but we do not think it can be here sustained. While in its original statement the agreement was somewhat vague, as oral contracts are quite apt to be, it was still reasonably def-</p> |
|---|--|

inite. Moreover, it has been fully performed. The fact that a contract may not be susceptible of specific enforcement does not necessarily imply its invalidity, and, if the parties thereto interpret its terms and carry it into effect by the transfer of property, the creditors of neither can demand the invalidating of such transfer on the mere ground of vagueness of the preliminary agreement.

II. It is next said that, while an agreement by a person to sell or assign his prospective inheritance will under some circumstances be enforced, yet to be so treated the

2. SAME: assignment of inheritance.

agreement must be fair and free from fraud in its terms and must be made with the consent of the ancestor. Here again we may say that assuming the rule of law to be as stated, and that its application would be sufficient to defeat the claim of the wife for a specific enforcement of her agreement with her husband, it does not follow that it affords any ground to invalidate the transaction when it has once been performed. True, in this as in all other transfers of property, if the transaction was planned or carried out with intent to defraud creditors or was a purely voluntary one on the part of the debtor, the court will not hesitate to defeat the fraud by subjecting the property to the payment of the debt. But, if the property has been transferred in good faith and for a valuable consideration, the creditor is not entitled to have the deed set aside in his favor simply because the debtor might have successfully resisted an action to compel him to make it. Assuming the truth of the testimony given on part of the appellees, the agreement between them was not an unfair one, nor was the consideration given by the wife so inadequate as in itself to suggest a fraudulent purpose.

III. The point is made that the agreement between the husband and wife by which he undertook to compensate her for moneys advanced to him and paid by her for family expenses from her earnings as a music teacher was without consideration, because under our statute she was equally

liable with him for family expenses. But may the conclusion here asserted be clearly drawn from the admitted premises? We may for the purpose of argument concede that the wife's service in caring for her household and other domestic duties would not afford consideration for an enforceable contract by her husband to make payment therefor; but her services in her professional capacity were not his, nor did the law give him any title or claim upon her earnings thus received. Under the law of this State she had the right to make him her debtor and to enforce the claim thus created, the same as though the marriage relation did not exist. She had the right to lend him the money arising from her professional earnings and to accept payment of the loan thus made. While the common creditor having a claim for family expenses could have enforced it against both husband and wife or either of them, yet as between themselves the wife had the right to say she would not use her own money for such purchases except upon an agreement of the husband to repay her, and, if he entered into such an agreement in good faith and did thereafter carry it out, the transaction is not voidable at the suit of his creditors.

The principle here affirmed was upheld in *Carse v. Reticker*, 95 Iowa, 25; *Gilbert v. Glenny*, 75 Iowa, 513; *Mewhirter v. Hatten*, 42 Iowa, 288; *Hoag v. Martin*, 80 Iowa, 714; *Clark v. Ford*, 126 Iowa, 460. We have held on several occasions that the voluntary payment by the wife of family expenses would raise no implied promise of repayment by the husband, but in the same connection we have said in effect that payments so made upon an express agreement to repay are not fraudulent or without consideration. *Courtright v. Courtright*, 53 Iowa, 57; *Patterson v. Hill*, 61 Iowa, 534; *Hayward v. Jackman*, 96 Iowa, 77. While the wife of the debtor in the instant case was under a legal obligation to pay debts contracted for family expenses, she was under no obligation, legal or moral, to pay for a threshing

machine bought by her husband on his own credit, or to surrender the profits of her personal labor for the benefit of the appellant. It is proper that the courts should scrutinize closely all transactions between husband and wife which result in giving the latter preference over other creditors; but, when satisfied that the wife is a creditor and that payment or security given her is in good faith, her right to protection is not destroyed or lessened because of her coverture. The trial court having the witnesses or most of them personally before it found the disputed fact questions in favor of the appellees, our reading of the record leads us to coincide in that conclusion.

IV. The deed from Greenlee to his wife was drawn and executed in Kansas. The wife was not present at the time and place of the execution, and the delivery of the deed was made to her at a later date. The expressed consideration in the instrument is "love and affection and one dollar." In explanation of this circumstance, the husband says that, on going to have the deed drawn and being asked by the notary concerning the matter of consideration, he stated the agreement between himself and wife substantially as he testified in the trial, but being then unable, in the absence of his wife, to state the exact amount of the debt, the notary informed him that a statement of a merely nominal sum in the deed was all that was necessary, and that upon such advice he executed the instrument.

4. DEEDS: consideration: parol evidence of.

It is argued by the appellant that the written expression of consideration comes within the general rule which excludes oral evidence to vary a written contract. Whether the rule thus invoked would apply if this were an action between parties to the deed we need not stop to inquire; for, even if such inquiry is to be answered in accordance with appellant's contention, it is thoroughly well established that the rule has "no application in controversies between a party to the instrument on the one hand and a stranger to it on the other,

for the stranger, not having assented to the contract, is not bound by it and is therefore at liberty, when his rights are concerned, to show that the written instrument does not express the full or true character of the transaction. And where the stranger to the instrument is thus free to vary or contradict it by parol evidence, his adversary, although a party to it, must be equally free to do so." 17 Cyc. 750; *Livingston & Schaller v. Stevens*, 122 Iowa, 62; *Clark v. Shannon*, 117 Iowa, 645. The evidence was properly admitted.

The decree of the district court was right, and it is affirmed

HUGH HOUSE V. H. M. CRAMER, Appellant.

Automobiles: RIGHT ON HIGHWAYS: CARE. Under the Statutes

- 1 operators of automobiles have the same right to use the highways that drivers of horses or other vehicles possess, but they must exercise reasonable caution for the safety of others, and in determining the degree of care required the character of the machine, its speed, size, appearance, manner of movement, noise and the like may be taken into consideration.

Same: NEGLIGENT OPERATION. To allow explosions from an auto-

- 2 mobile engine while the machine is standing is not negligence unless the operator sees, or by the exercise of reasonable care might see, that horses are frightened thereby; then failure to use reasonable diligence to stop the explosions and thus avoid an accident becomes negligence. Under the evidence no case of negligence requiring submission of the issue to the jury was made.

Appeal from Harrison District Court.—HON. W. R. GREEN,
Judge.

FRIDAY, MAY 17, 1907.

ACTION for damages occasioned by the frightening of plaintiff's team by the operation of defendant's automobile

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134	374
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resulted in a verdict and judgment against defendant, from which he appeals.— *Reversed.*

J. S. Dewell, for appellant.

Burke & Tamisiea, for appellee.

LADD, J.— At the intersection of Erie and Second streets, in Missouri Valley, is a blacksmith's shop facing south on Erie street and extending back on the east side of Second street sixty feet. The sidewalk in front of the shop is twelve feet wide, and out farther is a small platform. The sidewalk along Second street is six feet wide, and about two feet farther out is a row of hitching posts connected with a chain. In the afternoon of November, 9, 1904, the plaintiff's wife hitched his team, one to a post and the other to the chain, west of the shop and back from Erie street, a distance variously estimated by the witnesses at from thirty to sixty feet. A short time thereafter the defendant came along Erie street from the east in his automobile with gasoline motor, at a speed of about six miles an hour. He slacked up somewhat before reaching the shop, which was twenty feet wide, and came to a standstill with the front of his vehicle about two feet east of the east line of Second street, with defendant sitting therein eight feet further back, and two or three feet south of the platform. This platform was two or three feet wide, so the automobile when it stopped must have been about eighteen or twenty feet south of the shop. If the automobile stopped twenty feet out from the shop and two feet from the street line, the team could not have been hitched back from Erie street more than about thirty-five feet, for the evidence that the horses were then in the line of vision from the automobile seat was undisputed. The defendant may have disconnected the power from the running gear some twenty-five feet before stopping, but the evidence was in sharp conflict as to whether "the sparker or

ignitor was cut off " until after he had stopped. There was also a conflict in the evidence as to whether defendant might have seen the team from the place where he stopped. In short, the evidence was such that the jury might have found (1) that the defendant knew that teams were customarily hitched along Second street where Mrs. House had tied plaintiff's team; (2) that the explosion from defendant's automobile engine continued until it had stopped, and after the team had broken loose; (3) that defendant could have seen such team where tied from where he stopped; (4) that the damages were the proximate result of the negligence, if any, in stopping the machine at that place in the manner referred to. And the controlling question for decision is whether, under these circumstances, the defendant might have been found by the jury to have been negligent.

The right to make use of an automobile as a vehicle of travel along the highways of the State, is no longer an open question. Chapter 53, Acts 30th General Assembly (Laws 1904). The owners thereof have the same

1. AUTOMOBILES:
right in high-
ways: care.

rights in the roads and streets as the drivers of horses or those riding a bicycle or traveling by some other vehicle. But they are to use this means of locomotion with due regard for the rights of others having occasion to travel on the highways. The degree of care required necessarily depends somewhat on the character of the agency employed, and therefore the speed, size, appearance, manner of movement, noise, and the like may be taken into consideration in determining the degree of care to be exacted from the operator of an automobile. *Hannigan v. Wright* (Del.), 63 Atl. 234; *Wright v. Crane*, 142 Mich. 508 (106 N. W. 71); *Shinkle v. McCullough*, 116 Ky. 960 (77 S. W. 196, 105 Am. St. Rep. 249). As was observed in the case first cited, though comparatively new in use, there is nothing novel in the principles of law to be applied with respect to travel in them on the highways. All that is exacted is reasonable care and caution for the safety of

others. The decisions thus far have proceeded on this principle, and will be found collected in the notes to *McIntyre v. Orner* (Ind.), 4 L. R. A. (N. S.) 1131; *Christy v. Elliott*, 216 Ill. 31 (76 N. E. 750, 108 Am. St. Rep. 196, 1 L. R. A. (N. S.) 215), 3 Am. & Eng. Cases, 487. See *Hennessey v. Taylor*, 189 Mass. 583 (76 N. E. 224, 3 L. R. A. (N. S.) 345); *Raber v. Hinds*, 133 Iowa, 312. The difficulty is in applying the principles to the facts owing to the novelty of the latter.

Of course, noises incident to the operation of the machine are not, of themselves, negligent. Such is the holding with reference to the use of engines on railroads in cases cited by appellant. *Abbot v. Kalbus*, 74 Wis. 504 (43 N. W. 367). And by the same court this rule has been applied to motor cars. *Eischman v. Buchheit*, 128 Wis. 385 (107 N. W. 325). But noises may be emitted from a railway engine under such circumstances as to render the company liable as for negligence. *Andrews v. Railway*, 77 Iowa, 669; *Toledo R. Co. v. Harmon*, 47 Ill. 299 (95 Am. Dec. 489); *Cobb v. Railway*, 37 S. C. 194 (15 S. E. 878); *Alsever v. Railway*, 115 Iowa, 338. The same is true with respect to automobiles. The noise attendant on the operation of the machine necessarily depends on its character, and somewhat on the power employed. The defendant's vehicle was propelled by a gasoline engine, which, as the jury was instructed, "when in motion, is attended by explosive noises, and even when standing still, if the machinery is yet in motion, may make a whirring, grinding sound, and it is a matter of common knowledge that horses may be frightened thereby." The operator is charged with notice of this fact, clearly recognized by the statute cited, and with the duty of so handling his own vehicle as not to unduly interfere with the use of the highway by others. See *Wolf v. Des Moines Elevator Co.*, 126 Iowa, 659. As said in *Indiana Springs Co. v. Brown*, 165 Ind. 465 (74 N. E. 616, 1 L. R. A. (N. S.) 238), in referring to those traveling by automo-

biles and other modes: "Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury as well as inflicting injury upon the others, and in this the *quantum* of care required is to be estimated by the exigencies of the peculiar situation; that is, by the place, presence or absence of other vehicles and travelers, whether the horse driven is wild or gentle, whether the conveyance and power used are common or new to the road, the known tendency of any feature to frighten animals," etc. We have not discovered any case like that before us, but by applying these well-established principles to the facts as the jury might have found them, we apprehend little difficulty should be experienced in reaching a correct conclusion. The defendant did not see the horses before he stopped the car; but, as he knew teams customarily had been hitched along Second street west of the shop for twenty years past, he was charged with notice that horses might be tied there at the time.

If defendant was stopping but briefly, it was not negligence *per se* not to arrest the sparker. The evidence shows that he had come to the shop, as a neighborly act, to get certain repairs for Edgecome's automobile, and expected to stay but a moment. As he anticipated starting again shortly, he was not negligent in allowing the explosions to continue, unless he saw that these were frightening the team, or in the exercise of ordinary care ought to have noticed this, and by ordinary diligence might have stopped the explosions in time to have avoided the runaway. To determine this issue, it will be necessary to revert briefly to the evidence. From this it appears that the team broke loose at about the same time defendant stopped the automobile. The team did not come within his line of vision prior to that time. Some witnesses say the team escaped as the machine stopped, while others placed it immediately thereafter, but how long no one estimated, so that the record leaves it purely a matter of conjecture whether, by the exercise of ordinary dili-

gence and care, defendant might have noticed the condition of the team and interrupted the exhaust in time to have obviated their escape. Singular was on the corner opposite, and testified that: "Just about the time the team broke loose, the motor stopped. . . . I heard some one cry 'whoa' just before the team started. They jumped a little and broke loose. . . . I think he could see the team from where he was. The explosions from the automobile stopped just about the time the team broke loose. . . . I think young Mr. Edgecome was in the automobile also — at least they were all three in the machine when the team first began to pull back. The auto was just stopping at the time." Another witness testified that the first thing he noticed was defendant standing up in the machine, saying: "'There goes some one's team.' He did not make any effort to stop the noise of the machine. The noise was stopped after the runaway." Still another testified: "I do not think the machine was moving when the horses broke away. . . . When he came to a full stop, I saw the horses pull, and the north horse broke loose first. It was the first one to get scared." Gumb testified: "I saw the machine coming up. After it stopped I saw the horses jump and pull back. I noticed the horses began to pull back after the automobile stopped. I heard some one say, 'Look at the team jump up,' and I turned around and looked. I think the automobile had come to a stop before this." Matson testified: "I heard some one call 'whoa,' and at that time Mr. Cramer was in front of the blacksmith shop. He had stopped the machine, but the machine kept on moving." The defendant testified: "I was just getting up to get out of the machine, when I first heard the grinding of the buggy wheels as the team backed out. The first I noticed the horses the north one was much farther back than the south one and by that time they broke loose. The north horse may have broken before I noticed him, but they kept on pulling back. My machine did not move after I no-

ticed this team pulling, and they were gone before I could get out of the machine." A. Edgecome was in the blacksmith shop, and testified that at the time he came, "my son and another man were in the machine with him. He stopped in front or directly south of this platform spoken of. Soon after he stopped, I heard something scraping or rubbing on the back wheel as the team backed out. I looked out of the window on the west side of the building, saw the team had backed out, and were just heading north." Orlo Edgecome testified that he was in the machine; heard some one calling out that a team was getting away; that Mr. Cramer was still in the automobile. And, farther: "I could not see the team myself at the time. Afterwards, by looking forward, I could see the team around the corner. I saw Mr. Cramer rise and lean forward also."

If it be conceded that the automobile had come to a stop before the team pulled back and escaped, this must have happened immediately upon the stopping, and there is nothing in the record to justify the conclusion that had defendant, as soon as he saw or might have seen that the team was frightened, arrested the sparker, this would have been in time to have obviated their escape. There was no proof of how long would be required to silence the exhaust, or the time which elapsed after the fright of the team before it escaped; nor is there anything in the record from which it might be inferred that, had defendant acted promptly when the north horse backed, the explosions would have been interrupted before the other horse became frightened and both escaped. As said, the escape of the team seems to have followed immediately upon the stopping of the automobile, and as that was not negligent, a case was not made out for the jury.— *Reversed.*

JOHN FAGAN, Appellant, v. E. W. HOOK.

Abstract of title: SHOWING OF GOOD TITLE. An abstract of title

- 1 which discloses that a purchaser of land then under mortgage was not made a party to the foreclosure, but is still the holder of an adverse fee with right of redemption, does not show the right in another to convey the property under a contract providing for conveyance by a warranty deed with an abstract showing good title.

Same: GOOD TITLE. Good title means an estate in fee simple, a

- 2 marketable title, one that can be resold or mortgaged to another who exercises reasonable prudence with respect thereto.

Same. A contract to convey good title has reference to the

- 3 record title which may be epitomized in an abstract, and when it is further agreed to furnish an abstract showing such title, as a condition precedent, one cannot be required to rely upon any other evidence thereof than such as is contained in the abstract itself.

Same: PERFECTION OF TITLE. The statute authorizing the record

- 4 of affidavits to explain defects in a chain of title has relation to apparent rather than real defects; so that one who has agreed to convey and to furnish an abstract showing good title cannot perform his contract by making of record a title resting solely in parol, through the medium of affidavits.

Contracts for sale of land: BREACH: RESCISSION BY PURCHASER. A

- 5 vendor who has failed to furnish an abstract showing such title as he agreed to convey and is making no effort to perfect the same, is not entitled to a reasonable time to comply with his agreement after service of notice of rescission.

Same: RESTORATION OF PROPERTY. Where a vendee on contract

- 6 leased the land at the suggestion of the vendor a delivery of the lease with the rent to the vendor was sufficient restoration of the property to sustain a rescission of the contract.

Same: ESTOPPEL. A purchaser of land on contract is not estopped

- 7 to rescind for the vendor's breach to convey title by the fact that he failed to tender a lease and rent note prior to com-

134	381
137	270
137	753

134	381
138	62
138	615

134	381
141	572

134	381
144	411
144	672

mencement of his action; or that he listed the land for sale, where no prejudice resulted to the vendor.

Same: TENDER OF PERFORMANCE. Where time is not the essence
8 of a contract for the sale of land and the vendor has failed to furnish an abstract showing good title, as agreed, at the time fixed for performance, the fact that the purchaser was not in position to make his payment at that time will not defeat his right to rescission on subsequently tendering the amount due, if the vendor is still unable to convey good title.

Exchange of properties: BREACH OF CONTRACT: MEASURE OF DAM-
9 **AGES.** Ordinarily, where an action is for the recovery of property and its value has been agreed upon by the parties, the measure of damages is the value thus fixed; but if the values designated in the agreement do not appear to have been specified with reference to the true worth of the property, but merely as incidental to some other purpose not involving the intention of determining that question, the measure to be applied is the fair market value.

Same. Upon rescission of a contract for the sale or exchange of
10 real estate for personalty, the values of the property stated in the agreement do not govern the question of damages for the breach, since by rescission the contract is abrogated in its entirety; but upon failure to restore personalty which has been delivered the measure of recovery is its fair market value.

Appeal from Hamilton District Court.—HON. J. R. WHITAKER, Judge.

SATURDAY, NOVEMBER 18, 1905.

SUPPLEMENTAL OPINION MONDAY, MAY 20, 1907.

ACTION to rescind contract for exchange of personal property for land. The defendant in a cross-petition prayed for specific performance, which was decreed, and plaintiff's petition dismissed. The plaintiff appeals.—*Reversed.*

Wesley Martin and E. A. Morling, for appellant.

D. C. Chase, for appellee.

LADD, J.— The defendant was owner of 116.46 acres of land, and on November 7, 1902, agreed to convey the same to the plaintiff "by warranty deed, with abstract showing good title," on or before March 1, 1903, in consideration of "\$70. per acre, to be paid second party as follows: \$2,500. in fixtures, tools, and utensils, meat market on Second street, Webster City, Iowa, sold this day to first party by second party, and tools, fixtures, and utensils used in slaughter house, 1½ miles north of Webster City, and three head of horses, three colts, harness, four wagons, more particularly described in bill of sale from second party of even date herewith; and \$500. as follows: Stock of meats in meat market, as shown by invoice to be taken Nov. 15th, and cash sufficient thereto to make up the \$500.; and \$300. Dec. 15, 1902; \$2,500. by assuming a mortgage for that amount now against said premises; and the balance on March 1, 1903." All payments were made in conformity with the contract, save the last, which amounted to \$2,352.20. This was tendered in writing March 24, 1903, and a warranty deed, with an abstract showing good title, demanded. An abstract had been sent to a bank at Emmetsburg for plaintiff's examination prior to March 1st, but it was so dilapidated that a new one was required. This reached plaintiff's attorney March 18, 1903, and upon examination he was able to discover nineteen defects in that to one tract and thirteen in that to the other, and his letter to this effect was returned to defendant, who submitted it to his legal advisor. With reference to the requisitions so made he declared the title marketable, and, with other suggestions, said as to the abstract of the first tract: "The school fund mortgage cuts off subsequent grantees of mortgagor, if made parties to the proceedings. They were all before the court, but John Stahl. By an affidavit it appears that John Stahl made no claim and occupied no part of the land, and that William H. Hook and his grantees had adverse possession for more than twenty years. This would cut off any equity of re-

demption existing at time of foreclosure in John Stahl, in my opinion." And to that of the other: "It appears at No. 8 that at time of foreclosure of mortgage referred to above the legal title to a part of the land appeared of record to be in the name of Henry Vegons. He should have been made a party to the foreclosure proceedings. However, as the grantors of Emory W. Hook have had adverse possession for over twenty years, any right of redemption he might have had would probably be cut off. I would suggest that, if he was not made a party to the foreclosure proceedings, an affidavit be procured showing the adverse possession of William M. Hook and his grantors, and that the said Henry Vegons made no claim and occupied no part of said premises since said foreclosure proceedings." Thereupon the defendant instructed the abstractor to correct the record and abstracts in accordance with his opinions. This had been done at the time of the trial, but he had not tendered them prior thereto.

We need do no more than refer to the requisitions mentioned in the above extracts. Land including a part of the first tract had been patented by the State of Iowa to Isaac Hook September 25, 1854. No conveyance from the general government to the State appears. Hook conveyed 37 acres, one-half of which was of the land so patented to him, to one Mutter in 1856, and the latter deeded it to McNeeley in 1857, and McNeeley to John Stahl October 2, 1860. The abstract does not indicate that Stahl had ever parted with title. Prior to these conveyances, in October, 1853, Hook had executed a mortgage covering this land to the school fund commissioner, and this mortgage was foreclosed in 1864, and the land conveyed by sheriff's deed to Hamilton county February 1, 1865. But Stahl was not made a party to these proceedings, and so far as the abstract discloses is still owner of the fee, with right of redemption. As to him the decree of foreclosure was not effective and did not divest him of title.

1. ABSTRACT OF
TITLE: showing
of good title.

Landon v. Townsend, 112 N. Y. 93 (19 N. E. 424, 8 Am. St. Rep. 712); *Fowler v. Lilly*, 122 Ind. 297 (23 N. E. 767); *Hays v. Tilson* (Tex. Civ. App.), 35 S. W. 515.

A like defect appears in the abstract to the other tract. It had been patented to Isaac Hook in 1854 and mortgaged to the school fund commissioner the same year. Henry Vegons acquired title to seventeen and one-half acres of the tract, through mesne conveyances under Hook, in 1857. The mortgage was foreclosed in 1864, and a sheriff's deed executed to Hamilton county the year after. The abstract fails to show that Vegons was made party to the foreclosure proceedings or has since parted with title. With these outstanding titles in Stahl and Vegons, it is manifest that the abstract did not show good title in the defendant.

By good title is meant nothing less than an estate in fee simple. *Gilespie v. Broas*, 23 Barb. (N. Y.) 370, 381. And though a good title has been held by some decisions to be one not absolutely bad, the great weight of authority is to the effect that the expression means a marketable title, one which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for a loan of money. *Moore v. Williams*, 115 N. Y. 586 (22 N. E. 233, 5 L. R. A. 654, 12 Am. St. Rep. 844); *Harrass v. Edwards*, 94 Wis. 459 (69 N. W. 69); *McCroskey v. Ladd* (Cal.), 28 Pac. 216; *Smith v. Turner*, 50 Ind. 367; *Ladd v. Weiskopf*, 62 Minn. 29 (64 N. W. 99); *Herman v. Somers*, 158 Pa. 424 (27 Atl. 1050, 38 Am. St. Rep. 851); *Allen v. Atkinson*, 21 Mich. 351, 361.

But according to the abstracts defendant had no title at all to these tracts. The attorney reading the abstract for defendant seemed to be of the opinion that these defects might be obviated by the fact, if such it was, that the land had been occupied by defendant's grantors adversely for the statutory period of limitation, and this might be made to appear by making affidavits thereof, having them recorded, and noted on the abstract.

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But the plaintiff was not excepting to his ability to convey a good title, nor questioning the contention that such a title may be acquired by adverse possession. By the contract defendant was "to convey unto the second party by warranty deed, with abstract showing good title." This had reference to the record title, which might be epitomized in the abstract and was a condition precedent to his right to demand the deferred payment. *Lessenich v. Sellers*, 119 Iowa, 314; *Martin v. Roberts*, 127 Iowa, 218; *Spooner v. Cross*, 127 Iowa, 259; *Brown v. Widen* (Iowa), 103 N. W. 158. Nor was it enough that the title was in fact good. It should have so appeared on the abstract. *Lessenich v. Sellers, supra*; *Brown v. Widen, supra*; *Spooner v. Cross, supra*; *Boas v. Farrington*, 85 Cal. 535 (24 Pac. 787); *Noyes v. Johnson* (Mass.), 31 N. E. 767; *Sheehy v. Miles*, 93 Cal. 288 (28 Pac. 1046); *Zunker v. Kuehn*, 113 Wis. 421 (88 N. W. 605); *Heller v. Cohen*, 155 N. Y. 625; *Howe v. Hutchinson*, 105 Ill. 501; *Gwin v. Calegaris*, 139 Cal. 384 (73 Pac. 851); *Bruce v. Wolfe*, 102 Mo. App. 384 (76 S. W. 723). As said in *Brown v. Widen*: "The contract calls for an abstract showing good title, and nothing less than this would satisfy this condition, no matter what the vendor's real title might be."

The object of an abstract is to enable the vendee to pass upon the validity of the title, and to enable him to do so it should contain everything material concerning its sources and condition. *Kane v. Rippy* (Or.), 23 Pac. 180; *Bumaby v. Equitable Reversionary Interest Society*, 54 L. J. Ch. 466; *Taylor v. Williams*, 2 Col. App. 559 (31 Pac. 504); 1 Cyc. 213. "The object of an abstract," says Mr. Curwen, in his work on Abstracts (section 36) "is to furnish the buyer and his counsel with a statement of every fact and abstract of the contents of every deed on record upon which the validity and marketableness of the title depend, so full that no reasonable inquiry shall remain unanswered, so brief that the mind of the reader shall not be distracted by irrelevant details, so methodical that counsel may form an

opinion on each conveyance as he proceeds in his reading, and so clear that no new arrangement or dissection of the evidence may be required. The buyer has the right to demand a marketable title. He has a right to demand that the abstract of title shall disclose such evidence of that title as will enable him to defeat any action to recover or incumber the land." The title may be good; but one to whom an abstract showing good title has been promised as a condition precedent is not bound to accept any evidence thereof, except that contained in the abstract. The vendee in such a case is not required to accept or rely on parol evidence of title, or information dehors the records, or the word of the vendor. That the title was not only to be good, but that the abstract was to so exhibit it, was a valuable consideration in entering into the agreement; for every one recognizes the superior salability of land with good paper title. Even if good title might be established by parol, the only evidence of adverse possession adduced was that of plaintiff, in response to the question: "How long had the land been occupied by the persons of whom you bought it, to your knowledge? A. It had been occupied between 12 and 15 years to my knowledge by the same fellows." There was no showing as to the character of their possession, nor whether in hostility to the true owners. The affidavits of Hook as to adverse possession had been recorded and noted on the abstract. The abstract, but not the affidavits, was introduced in evidence. It seems unnecessary to say that a condensed statement of a copy of a record of an affidavit was not admissible in evidence in proof of the facts therein recited, when the affidavits themselves were not admissible.

Evidently neither party proceeded on the theory that oral evidence of adverse possession might be considered. The theory of the defendant seems to have been that, though

4. SAME: per-
fection of
title. such possession might not be proven, the abstract of title could be perfected by causing to be recorded affidavits that defendant's possession had been

adverse and noting these on the abstract. Affidavits generally are not recordable; for the Code, in designating those papers which may be recorded, by implication excludes all others. An exception, however, is found in section 2957 of the Code, providing that "affidavits explaining any defect in the chain of title to any real estate may be recorded as instruments affecting real property." The precise effect of this statute is not clear. It is enough in the instant case to note that it does not authorize the owner to supply a link in the chain by indicating, in the form of an affidavit, the oral evidence available to establish it. From the wording of the statute it was likely intended to enable the landowner to make of record explanations of apparent, rather than real, defects. Certainly it was not intended to enable any one to make of record a title resting solely in parol. Those in this case did not help the record. They were in the nature of hearsay, so say all the authorities (2 Cyc. 35), and not proof of what they purported to express. We conclude that the abstract did not exhibit such a title as defendant contracted that it should.

II. Plaintiff caused notice of rescission to be served on the defendant April 8, and begun this suit April 9, 1903; and the latter insists that he was entitled to a reasonable time after notice to comply with his agreement. Whether he was not bound to be in a situation to perform on the day stipulated need not be determined. But see *Primm v. Wise*, 126 Iowa, 528; *Webb v. Hancher*, 127 Iowa, 269. The evidence shows that he was making no effort to remedy the defects in the abstract to which we have adverted. He was relying upon the advice that adverse possession met the situation, and even at the trial in November following had not remedied them. As he did not propose to perfect the abstract, there was no occasion to delay suit.

III. The evidence shows that in reliance upon the performance of the contract on defendant's part the plain-

5. CONTRACT FOR
SALE OF LAND:
breach: re-
scission by
purchaser.

tiff on February 12, 1903, leased the land to one Sallee for the term of one year from March 1, 1903.

6. SAME: restoration of property.

The rental was \$250, which has been paid into the hands of the clerk of court to abide the result of this action; the parties stipulating that in event of a decree rescinding the contract it shall be paid to defendant, but to plaintiff if specific performance is ordered. Defendant insists that the effect of leasing the land was to place an incumbrance thereon, which prevented plaintiff from restoring as good a title as was received. That this was essential may be conceded. *Stevenson v. Polk*, 71 Iowa, 280; *Burge v. Cedar Rapids R. Co.*, 32 Iowa, 101. But the lease was executed with defendant's knowledge and without objection. The defendant himself was not occupying the land. It was leased to tenants, and he recommended Sallee to plaintiff as a suitable tenant. In these circumstances we think the delivery of the lease with the rent to the defendant a sufficient restoration of the property.

IV. It is said that, as plaintiff did not tender back the note and lease prior to the beginning of the action, he is estopped from electing to rescind. But this court has held

7. SAME: that it is in time if personal property even estoppel.

is tendered for the first time in the petition asking for rescission. *McCorkell v. Karhoff*, 90 Iowa, 545. Prior to ascertaining that defendant could or would not perform his part of the agreement plaintiff listed the land for sale, and it is said that by this he is estopped from rescinding. But it does not appear that defendant was misled thereby to his prejudice, and for this reason the plea cannot be sustained.

V. Again, defendant urges that plaintiff was never in a situation to comply with his part of the agreement. There is no doubt that he experienced some difficulty in rais-

8. SAME: ing the money, but the evidence that he had tender of performance.

arranged for more than enough to meet the deferred payment is undisputed. True, he did not have

it on March 1, 1903, the day fixed for performance. He did have a large portion of it, and had so arranged for the balance that he could have obtained it at the time of the written tender on the 24th of March, had it been accepted. Time was not made the essence of the contract, and as the delivery of an abstract showing good title was a condition precedent to the deferred payment, and it had not then been furnished, this was timely. It is said that plaintiff should have paid interest on the mortgage he assumed from January 1, 1903. It does not appear to have been due. Moreover, this portion of the contract was merely for the purpose of fixing the date from which interest on the mortgage debt was to be assumed.

VI. The answer sets up fraudulent concealment on the part of Fagan, but the evidence fails to sustain the charge. If part of the meats were injured, Frick advised defendant of the fact, and notwithstanding this information he accepted them at the prices stated in the invoice. The claim that property of others was included is without support. Considerable evidence was introduced bearing on the value of the property turned over to the defendant, but the parties themselves have agreed upon its value, as well as the value of the land, and by that they are bound. As defendant has disposed of the property, he must pay its value as stipulated.

We conclude that, as defendant failed to furnish the abstract as agreed, the decree of specific performance should be reversed, and a decree entered rescinding the contract, and also for judgment in favor of plaintiff for the money paid defendant and the value of the property delivered to him, with interest at the rate of six per cent. per annum from the dates of such payment and delivery, and that the rent money should be applied on such judgment.—*Reversed.*

Supplemental opinion.

PER CURIAM.—Appellee has asked for a rehearing on the ruling with respect to the measure of damages, insisting

that appellant should be allowed the market value of the personal property paid on the land only, rather than the value as fixed by the contract.

Ordinarily, where the action is for the recovery of property, and its value has been agreed upon by the parties, the measure of damages is the *quantum* thus fixed. Such has
 9. EXCHANGE OF PROPERTIES: always been the rule of this court. Thus in
 breach of contract: *Howes v. Axtell*, 74 Iowa, 400, it was said
 measure of damages. that, "when parties by solemn agreement fix a value to property, they are bound by it. The law will not in a case of this kind permit either party to dispute the value as settled by them." There the action was to recover for the difference in acreage of land conveyed and that represented to be contained in the tract, and the price fixed in the deed was held to be the value of the tract as represented. See, also, *Hallam v. Todhunter*, 24 Iowa, 166; *Connors v. Chingren*, 111 Iowa, 437; 2 Sutherland on Damages, 606; *White v. Street*, 67 Tex. 177 (2 S. W. 529); *Cummings v. Dudley*, 60 Cal. 383 (44 Am. Rep. 58); *Harrington v. Wells*, 12 Vt. 505. If parties definitely settle upon and agree to the value of their respective properties for the purpose of sale one to the other, no inquiry concerning actual values is permissible, as these are put beyond question by their having determined the worth thereof for themselves, and thereby fixed the measure of damages in event of a breach. If, on the other hand, the agreement is a mere trading contract, by the terms of which one party is to exchange certain property belonging to him for that of the other upon or by the payment of the difference, and to this end and for the purpose solely of accomplishing this result, but not to ascertain their actual values, estimates are placed on the respective properties, then neither party is bound by the values so estimated, and the measure of damages to be applied is that of *quantum meruit*. In other words, the values designated in the agreement to be binding on the parties must appear to have been specified as such, and not

as merely incidental to some other purpose not involving the intention of deciding the true worth. The criterion in determining whether there has been a sale or exchange of personal property is whether there is a fixed price at which the things are to be exchanged. If there is such fixed price, the transaction is a sale; but, if there is not, the transaction is an exchange. Teidman on Sales, section 12. This rule has been applied to dealings in land by the Court of Civil Appeals of Texas. *Thornton v. Moody*, Tex. Civ. App. (24 S. W. 331). See *Heywood v. Heywood*, 42 Me. 229 (66 Am. Dec. 277); *Harrington v. Wells*, 12 Vt. 505.

Appellee insists that the agreement was merely a trading contract, and therefore only the market value of the property should be allowed; but the price of the land was definitely fixed and also the prices at which the property should be credited thereon stipulated, and evidence introduced leaves it extremely doubtful whether these values were mere estimates. So that, were the rules to which we have adverted applicable, we might be inclined to adhere to the conclusion stated in the opinion heretofore filed.

But we are not limited to the reasons urged by counsel in reaching the right result. Upon rescission there remained no contract to fix the values of the property. Upon the fail-

ure of the defendant to make good title to the
10. SAME. land, the plaintiff had the right to affirm the continued existence of the contract and maintain an action for damages, or, at his election, he could rescind the contract and demand that defendant place him in *statu quo* by restoring to him the money, if any, which he paid and the property which he had delivered in fulfillment of the agreement on his part. Plaintiff elected to pursue the latter course, and the only enforceable right he has is to be placed in the position he occupied before the contract which he repudiates was made. He is not entitled to recover the profits of his bargain, for to do that he must affirm the contract,

and this he has barred himself from doing by his election to rescind. The contract being rescinded, it stands for naught. It is avoided. See Abbott's Law Dictionary; Bishop's Contracts, 679; *Bank v. Maddox*, 4 Okl. 583 (46 Pac. 563). In its very nature rescission implies the extinction of the contract, and, once accomplished, neither party can base any right of recovery upon it. Plaintiff's right to demand a return or redelivery of the personal property is not because of the existence of any contract between them, but because there is none. If, upon proper demand for said property, the defendant fails or refuses to return it, he is liable to plaintiff as for a conversion, or, if plaintiff's claim may be said to sound in contract, it is the contract which the law implies whereby a party who has received property belonging to another is held to promise and undertake to surrender it to the true owner on demand therefor. *Freer v. Denton*, 61 N. Y. 492; *Byxhie v. Wood*, 24 N. Y. 607. He may recover nothing more than the property in kind, or, failing in that, its fair or reasonable market value. As having some bearing upon the question here discussed, see *Brigham v. Evans*, 113 Mass. 538; *Laraway v. Perkins*, 10 N. Y. 371; *Clark v. Mining Co.*, 28 Mont. 468 (72 Pac. 978); *Merrill v. Merrill*, 103 Cal. 287 (35 Pac. 768); *Nichols v. Pinner*, 18 N. Y. 312; *Dayton v. Warren*, 10 Minn. 233 (Gil. 185); *Yeomans v. Bell*, 151 N. Y. 230 (45 N. E. 552); *Reynolds v. Franklin*, 41 Minn. 279 (43 N. W. 53); *Warren v. Chandler*, 98 Iowa, 237.

Reverting to the evidence, we find that the meats were invoiced at values agreed upon subsequent to the execution of the contract. Appellee conceded in oral argument that the other property, priced in the contract at \$2,500. was worth \$500. and an examination of the record has confirmed the correctness of this estimate. The plaintiff is entitled to recover these amounts, together with moneys paid, with interest computed as indicated in the opinion.

With this modification, the former opinion will be adhered to.

T. A. GORMLY, Appellant, v. TOWN OF MT. VERNON, Appellee.

Municipal corporations: UNAUTHORIZED ACTS OF OFFICIALS: LIABILITY OF TOWNS. There is no fixed obligation on the part of a town to reimburse an officer who errs in his duty and commits an unauthorized and unlawful act whereby damage is imposed upon him in consequence of the wrong done.

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

THURSDAY, JULY 12, 1906.

REHEARING DENIED, MONDAY, MAY 20, 1907.

THIS is an appeal from a ruling of the court below sustaining a demurrer to plaintiff's petition. The substance of the allegations of the petition follows. It is said: That in the year 1899 the town council of the defendant town — a municipal corporation of this State — passed a resolution as follows: "Moved and seconded that the marshal and street commissioner be ordered to remove the sidewalks and fences now standing across Penn street. Carried." That plaintiff, as mayor of said town, and acting solely in his official capacity, directed the marshal and street commissioner to open Penn street, which they did by removing the obstructions and fences thereon. That one Young, claiming to be the owner of the ground theretofore inclosed, proceeded to rebuild the fence; and while so doing, and to prevent further interference with the work of carrying out the order of the town council, he, said Young, was arrested by R. J. Alexander, street commissioner, but without a warrant, and brought before plaintiff as mayor. That, as no information was filed, he, said Young, was discharged and released. That thereafter

said Young commenced action in the District Court of Linn county against the plaintiff for damages, alleged to have been sustained on account of said arrest; the charge against plaintiff being that, as mayor of the town, he had upheld and authorized such arrest. And plaintiff says that he was compelled to appear and defend said cause at great expense, and to pay a judgment recovered against him therein in favor of said Young.

Further pleading, plaintiff says that said Young also commenced a suit in said District Court against himself and others, charging that he, this plaintiff, had conspired with other members of the town council to injure the premises of said Young, and setting up the acts done in connection with the council proceedings as stated in the first paragraph of the petition; that said action was tried and resulted in a judgment in favor of said Young, but that on appeal such judgment was reversed and thereafter the action was dismissed. Plaintiff says that on account of said action he was put to expense in a sum named.

In a second count of the petition there is alleged a similar action as for conspiracy, commenced by said Young against R. J. Alexander, street commissioner of said town, which he, said Alexander, was compelled to defend at great expense, etc., and which action upon trial was also dismissed; that assignment of all right and claim as against the defendant town has been assigned to plaintiff. The general allegation is then made that all the things done by plaintiff and Alexander out of which said actions grew were had and done by them strictly in the line of their official duties, and as commanded thereto by the said resolution adopted by the council of the defendant town; that plaintiff has presented to the council a claim and demand asking that he be reimbursed for all the costs, expenses, and payments made by himself and Alexander as stated, which claim and demand has been refused. The demurrer declares in various forms for the non-liability of the town either to plaintiff or to Alexander on ac-

count of the matters pleaded. The demurrer having been sustained, plaintiff elected to stand on the ruling, and from the judgment entered, dismissing his petition and for costs, he appeals.— *Affirmed.*

Jamison & Smyth, for appellant.

William Dennis, for appellee.

BISHOP, J.— It will be observed that the motion or resolution of the council was addressed to the marshal and street commissioner. The contention of counsel in argument is that as matter of law it was the duty of plaintiff to execute and enforce the orders of the council, and that in giving direction to the marshal and street commissioner to proceed he was acting strictly within the line of his official duty. Conceding for present purposes the proposition of law thus contended for, the situation presented by the first count of the petition, as related to the arrest of Young and what followed, may in fairness to plaintiff be stated thus: While acting in the line of his duty in directing the removal of obstructions in a street of the town, and conceiving that Young was unlawfully interfering with the performance of the work, plaintiff assumed to authorize Alexander to arrest him without a warrant; that upon being brought before plaintiff as mayor said Young was discharged for want of an information filed; that thereupon Young commenced an action against plaintiff for false arrest and imprisonment which action plaintiff was required to defend, and in which judgment was recovered against him which he paid. No argument ought to be needed to make it plain that out of this no cause of action arose in favor of plaintiff against the town. On his own showing, plaintiff was haled into court and mulcted in damages because of his own unauthorized and unlawful act. That was the substance of the charge made against him, and such must be the effect given the judg-

ment which he says was entered against him. It is certain on reason and authority that for the unlawful act of plaintiff in causing or being concerned in a false arrest and imprisonment of Young the town would not be liable to the latter in damages. *Caldwell v. City of Boone*, 51 Iowa, 687; *McFadden v. Town of Jewell*, 119 Iowa, 321. 19 Cyc. 336. It would be utterly beyond all bounds to say that in the case of an officer of a town, who errs as to his duty and commits an act not only unauthorized but unlawful, whereby another suffers injury and damage, a legal obligation arises on the part of the town to reimburse such officer for the costs, expenses, and damage imposed upon him in consequence of his wrong so done. No one of the cases cited in the brief of counsel for appellant is in conflict with this view. Counsel call our attention to several cases holding it to be within the discretionary power of a municipality to make reimbursement to an officer proceeded against as was this plaintiff. Among others are *Sherman v. Carr*, 8 R. I. 431; *Cullen v. Town*, 103 Ind. 196 (2 N. E. 571, 53 Am. Rep. 504); *City of Murphy*, 94 Minn. 123 (102 N. W. 219, 68 L. R. A. 400). And possibly such is the law. But there is a wide difference between an exercise of discretionary power to thus favor an officer and a fixed obligation which may be enforced by such officer in an action at law.

What has been said above applies equally to the situation as presented by the averment of the action against plaintiff for a conspiracy. The wrong with which he was charged could not be said to have been connected in any way with a performance of official duty. No authority is cited to our attention, and we know of none, holding that the town can be compelled to reimburse him for costs and expenses thus incurred.

As the claim set out in the second count of the petition, and held by plaintiff under assignment from Alexander, is similar in character to the one we have been considering,

the same may be considered disposed of by what has already been said.

We conclude that there was no error, and the judgment is *affirmed*.

GRACE MCBRIDE, Administratrix of the Estate of B. McBride, Deceased, v. DES MOINES CITY RAILWAY COMPANY, Appellant.

Negligence: INSTRUCTION. In an action for negligence the court
1 in its instructions should not call special attention to circumstances favorable to one party and omit all reference to those favorable to the other party.

Same. Where there is a conflict in the evidence on the question of
2 an exercise of care on the part of a motorman in endeavoring to check the speed of his car in time to have avoided an accident, it is error for the court by its instructions to withdraw that issue from the jury, although it is conclusively shown that he had sufficient time.

Street railways: NEGLIGENCE: EVIDENCE: ADMISSIBILITY. An ordinance providing that the apparatus of the fire department shall
3 have the right of way upon the streets, where responding to an alarm of fire, is admissible in an action for the death of a fireman killed by the collision of a wagon on which he was riding with a street car, as bearing on the question of the exercise of care by the motorman; while an ordinance prior in time of enactment giving to street cars the right of way in matters of ordinary street traffic is inadmissible.

Ordinances: EFFECT OF RE-PUBLICATION. A mere re-publication of
4 ordinances in book form does not amount to a re-enactment so as to abrogate the rule that a later ordinance will, as to the subject matter covered thereby, control one previously enacted.

Same: CONSTRUCTION. An ordinance as to a specific subject matter will control general provisions on the same subject which
5 otherwise would prevail.

Same: INSTRUCTION. In construing the legal effect of an ordinance it is not error to set the ordinance out at length in an
6 instruction.

Negligence: EVIDENCE. Rules purely for the government of members of a fire department are immaterial in an action against
7

a street car company for the negligent death of a member of the department.

Imputed negligence. Any negligence of the driver of a fire wagon
8 which collided with a street car causing the death of a member of the department, who was riding on the rear of the wagon, cannot be imputed to the deceased; nor does the rule governing the negligence of one engaged with others in a common enterprise have any application.

Admission or evidence: PREJUDICE. Where evidence as to the
9 distance within which a street car can be stopped is stricken, because based upon a supposed use of different appliances than those in use on the car in question and the jury is directed to give it no consideration, and subsequently the witness changes his evidence on the subject to correspond with that of a prior witness, it will be presumed that the jury followed the court's direction to disregard the stricken testimony, in the absence of a showing of prejudice.

Instinct of self-preservation: INSTRUCTION. In an action for negligence resulting in the death of plaintiff's intestate, refusal to
10 instruct the jury to take into consideration the instinct of self-preservation in determining the question of deceased's contributory negligence is not erroneous, where there was no reference to the subject upon the trial.

Appeal from Polk District Court.—**HON. HUGH BRENNAN,**
Judge.

TUESDAY, NOVEMBER 13, 1906.

REHEARING DENIED, MONDAY, MAY 20, 1907.

ACTION to recover damages resulting to the estate of plaintiff's intestate by reason of his death, due to injuries received in a collision between a car operated by the defendant company and a hose wagon, belonging to the fire department of the city of Des Moines, on which the deceased, a member of the department, was riding. There was a verdict for plaintiff, and from the judgment rendered thereon defendant appeals.—*Reversed.*

N. T. Guernsey, for appellant.

Thomas A. Cheshire, for appellee.

MCCLAIN, C. J.—The facts appearing in the record which are essential to the determination of the questions of law raised on this appeal are as follows: Plaintiff's intestate was a member of the paid fire department of the city of Des Moines, and in response to a fire alarm, about half past ten in the morning, with eight other members of the department, he started on a hose wagon from the fire station on Eighth street going north. One Nagle was the driver of the wagon. Plaintiff's intestate rode in his proper place on a running board or step on the west side of the wagon, facing east and near the rear end. As the wagon approached the crossing of Grand avenue running east and west, on which there was a double track of defendant's railway, the driver saw a car coming from the west, and without checking the speed of the wagon drove on across the track on which the car was approaching. The car struck the rear wheel on the west side of the wagon, and deceased was violently thrown to the pavement and his skull was fractured. From this injury he died within a few hours.

I. After stating very elaborately and in great detail the claims of the parties as to the facts bearing upon the question of the negligence of the defendant's motorman, in charge of the car which collided with the hose wagon on which plaintiff's intestate was riding, and defining negligence, the court instructed the jury to consider "whether or not the motorman having charge of the running and operating of the car in question was negligent or not in not stopping or checking the speed of the car before the collision with the fire hose wagon occurred"; and he then proceeded to detail a variety of circumstances which the evidence for plaintiff tended to establish, such as the clearness and calmness of the day, the ringing of the bell on the hose wagon, and the distance at which such bell might be heard, the rate of speed of the wagon, etc., none of which

1. NEGLIGENCE:
instructions.

were controlling on the question of the motorman's negligence. And he concluded the instruction with this sentence:

After carefully considering these facts, if they be facts, and all other facts and circumstances proved on the trial, if you believe from a preponderance of the evidence that the motorman by the use of the means at his command could have stopped the car, or checked the speed thereof, in time to have avoided the accident, and that he failed to do so, that would be negligence on his part; and his negligence, if he was so negligent, would be the negligence of the defendant, and your verdict should be for the plaintiff, unless you find the deceased, B. McBride, was negligent, and that his own negligence contributed to his injury in any degree, in which case you would find for the defendant.

The first objection urged to this instruction as a whole is that therein the court called to the attention of the jury the facts which the evidence tended to establish favorable to plaintiff's recovery, and omitted special reference to those relating to defendant's theory of the accident. This objection we think was well taken. An instruction was asked on behalf of defendant, calling attention to other circumstances which the evidence tended to establish, which should have been considered as bearing on the motorman's negligence, and which were favorable to defendant's contentions in the case. It was clearly improper for the court to thus emphasize the circumstances from which negligence might be inferred, and omit any reference to circumstances tending to support the opposite inference. Perhaps the court might properly have omitted to catalogue the circumstances which the testimony tended to establish bearing on the question of negligence, and simply have referred in a general way to the facts and circumstances proved on the trial. But in suggesting to the jury that they should take into consideration some of the circumstances which were favorable to the plaintiff, and omitting reference to others favorable to defendant, he put the case unfairly to the jury.

Another serious objection to the instruction is that the portion thereof above set out withdraws from the jury the question whether the motorman was negligent in not stopping the

car or checking the speed thereof in time to

2. SAME.

have avoided the accident. There could be no question under the evidence as to the ability of the motorman by the use of the means at his command to stop the car or check the speed thereof in time to have avoided the accident, if he had endeavored to do so a sufficient length of time before the accident occurred, nor was there any doubt that he failed to stop the car or check its speed so as to prevent the result of a collision; and the court specifically instructs the jury that this ability on the part of the motorman and his failure to act constituted negligence. The real question in the case was, not whether the motorman could have stopped the car, but whether he was negligent in not doing so; and this was a question for the jury, and not for the court. Had the evidence shown without controversy that the motorman, in the exercise of care, could and should have anticipated the collision long enough beforehand to enable him to stop the car or check its speed so as to avoid the accident, then the instruction might have been correct. But the facts were in dispute. There were circumstances supporting either conclusion, and the question of negligence should have been left to the jury.

It is no answer to this position to say that in the first part of the instruction the jury were told that they must consider whether or not the motorman was negligent in not stopping or checking the speed of the car. After this general statement, the court proceeded to enumerate a large number of circumstances indicating that the motorman was negligent, and then told the jury that if these circumstances were found to be established, and they believed from these and other circumstances proved on the trial that the motorman could have stopped the car, he was negligent. It was not the physical ability of the motorman to stop or check

the speed of the car that was in question, but his failure to use due care. The instructions as a whole are lengthy and intricate in their statements, and the one now specially under consideration is particularly obscure, and the bald statement at its conclusion that the motorman was negligent if he could have stopped or checked the speed of the car in time to avoid the accident, and failed to do so, may very well have been seized upon by the jury as the solution of the whole difficulty. We reach the conclusion that in the two respects pointed out the instruction was erroneous and misleading.

II. Over the defendant's objection the court allowed the plaintiff to introduce in evidence a section of the city ordinance relating to the fire department as follows: "Sec.

3. STREET RAIL-
WAYS: negli-
gence: evi-
dence: admis-
sibility.

353. Fire Department Not to be Obstructed.

Sec. 8. The engines, hose carriages, officers, men and apparatus of the fire department, shall have the right of way while going to and at any fire, and any person willfully obstructing the firemen in the performance of their duty shall be deemed guilty of a misdemeanor and be liable to punishment for such offense." And the court refused on plaintiff's objection to allow the defendant to introduce a section of the city ordinance relating to the operation by defendant of its street cars as follows: "Sec. 1304. Penalty. Sec. 8. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to said car; nor shall any person willfully or maliciously obstruct, hinder, or interfere with any of said railway cars, by placing, driving, or stopping, or causing to be placed, or driven in a slow pace, or stopped, any team, vehicle or other obstacle in, upon, across, along, or near the tracks of said railway, or either of them, after being notified by the driver or conductor by the ringing of the car bell, or otherwise; and whoever shall willfully violate any of the provisions of this section shall, upon conviction thereof

before the police judge of said city, be fined in any sum not less than \$5 nor more than \$50." With reference to the section of the ordinances which was admitted in evidence, the court, after quoting it in an instruction, charged as follows:

You are instructed that, while the defendant had the right to operate its cars upon the streets of the city, it was bound to use ordinary care and caution in the operation thereof. And if you find from the evidence that the hose wagon in question was being driven upon said street in response to the alarm of fire, the driver of the hose wagon, the decedent riding upon such wagon, and the defendant are presumed to have been familiar with this ordinance; and in view of this ordinance the hose wagon was entitled to the right of way, and the conduct of the driver and the person riding upon the hose wagon, as well as the defendant, must be judged in the light of the conditions of this ordinance. And if you find that the defendant failed to use ordinary care and caution in stopping its car or checking the speed thereof, and that that was the proximate cause of the accident and the injury which resulted in the death of intestate, you will find for the plaintiff, unless you further find that intestate was himself guilty of negligence which contributed to his injury.

The section of the ordinance first quoted above was properly admitted as bearing on the question of the duty of the motorman to assume that the hose wagon would not be stopped for the purpose of allowing the car to pass by in front of it, but that on the other hand the driver of the hose wagon would proceed on the theory that he had the prior right at the crossing. While the ordinance does not require a higher degree of care on the part of the motorman with reference to the firemen on the hose wagon than with reference to any other person, it would charge the motorman with knowledge of a fact very material in determining whether he exercised the care required under the circumstances. The section of the ordinance relating to the operation of defend-

ant's cars and giving them the right of way as to teams or vehicles on the street was properly rejected, because it had no application to the case of a hose wagon belonging to the fire department. The fire department ordinance was later in enactment than the street car ordinance, and its provisions would control as to the specific subject-matter referred to therein.

It is argued that these two ordinances were subsequently included in the Revised Ordinances of the city and therefore were to be construed together, but it appears that the so-called Revision of the Ordinances of 1900, published in 1904, was not an enactment, but merely a republication, and we do not think that such a republication would affect the rule of construction otherwise applicable that the later ordinance would control the former as to any subject-matter covered by the subsequent enactment.

However this may be, the specific provision of the ordinance as to the engines and carriages of the fire department constitute exceptions to the general provisions relating to teams and vehicles. That the provisions of a statute or ordinance as to a specific subject-matter will prevail over general provisions which, but for the specific provision on the same subject, would have covered the subject-matter of the latter, is a proposition too elementary to require discussion. In *Christy v. Des Moines City R. Co.*, 126 Iowa, 428, it was held that the ordinances of the city regulating the conduct of the employés of the street railway company in operating its road were properly rejected when offered in evidence; but in that case the question was whether plaintiff, seeking to recover for personal injuries received by reason of negligence of the street car employés, could establish the measure of their duty by showing the provisions of the ordinances on the subject, and all that was held was that the duties imposed by the ordinances were not different from those imposed by law, and therefore

the provisions of the ordinances were wholly immaterial. We are satisfied with the rulings of the court admitting the section of the ordinances relating to the fire department and excluding the section relating to the operation of street cars with reference to teams and vehicles in general.

It is objected that the court should have construed the section of the fire department ordinance, and not submitted it to the jury for their construction. But this, we think, is just what the court did. Perhaps it was unnecessary to set out the section of the ordinance in the instruction, but the court proceeded to tell the jury what was the effect of the ordinance, and there could have been no prejudicial error in setting out its language.

In this connection may be noticed the ruling of the court sustaining an objection on behalf of the plaintiff to the offer in evidence of the rules of the fire department offered by the defendant. These rules were intended for the guidance of members of the department, and were issued only to them. They were not issued for the purpose of advising the public what the conduct of the firemen would be under any particular emergency, and the public had no reason to know what they were or to rely upon them. The motorman of the defendant cannot be assumed to have acted with reference to or in reliance on any such rules, for he had no reason to know of their existence, and there is nothing to indicate that he did know what they were, or rely upon them in any way. These rules could not, therefore, have had any bearing on the question whether the motorman was negligent. The bearing of the rules on the conduct of the deceased and of the driver of the hose wagon will hereafter be considered.

III. The jurors were instructed that, in determining whether the deceased was negligent in any way contributing to his injuries, so as to defeat recovery, they need not consider the action of the driver of the team drawing the hose wagon, as his action and conduct

6. SAME: instruction.

7. NEGLIGENCE: evidence.

8. IMPUTED NEGLIGENCE.

could not be imputed to the deceased. The evidence shows that deceased was near the rear end of the hose wagon, standing on a running board and holding onto a railing provided for the purpose, while the driver was on the front seat, guiding the horses and urging them onward in response to the fire call, and it is quite apparent that deceased was in no way responsible for the action of the driver, unless, from the mere fact that the deceased was being transported on the hose wagon managed by the driver, the conduct of the latter was to be imputed to the former. And counsel for appellant concede this to be the situation; for, in a requested instruction, the rule is announced that, if the proximate cause of the collision was the negligence of the driver, and such collision would not have occurred, had the driver exercised reasonable and ordinary care, then the plaintiff could not recover. The bald question is thus presented whether the negligence of the driver of the hose wagon, if there were any negligence on his part contributing in any way to the injury, should be imputed to deceased and defeat plaintiff's recovery. This court has, in several cases, refused to countenance the doctrine of imputed negligence. *Nesbit v. Town of Garner*, 75 Iowa, 314; *Wymore v. Mahaska County*, 78 Iowa, 396; *Larkin v. Burlington, C. R. & N. R. Co.*, 85 Iowa, 492; *Bailey v. Centerville*, 115 Iowa, 271; *Willfong v. Omaha & St. L. R. Co.*, 116 Iowa, 548.

It is argued however, that the case before us falls within the rule of a class of cases in which imputed negligence or something akin to it is recognized, and that these cases are not only not expressly overruled, but are regarded as still announcing the law of this State. The leading case of this group is *Payne v. Chicago, R. I. & P. R. Co.*, 39 Iowa, 523, which, with other cases following it, is commented on in *Nesbit v. Town of Garner, supra*. The ground of the decision in the *Payne* case is very briefly and inadequately stated, and that case has been cited in other courts (see *Dean v. Pennsylvania R. Co.*, 129 Pa. 514 (18 Atl. 718, 6 L. R.

A. 143, 15 Am. St. Rep. 733); *New York, P. & N. R. Co. v. Cooper*, 85 Va. 939 (9 S. E. 321); *Noyes v. Boscawen*, 64 N. H. 361 (10 Atl. 690, 10 Am. St. Rep. 410) as supporting the general rule of imputed negligence announced in *Thoroughood v. Bryan*, 8 C. B. 114, which has been expressly repudiated in practically all the courts of last resort in this country in which the question has been considered. See *Little v. Hackett*, 116 U. S. 366 (6 Sup. Ct. 391, 29 L. Ed. 652); *Union Pacific R. Co. v. Lapsley*, 51 Fed. 174 (2 C. C. A. 149, 16 L. R. A. 800); *Kowalski v. Chicago & G. W. R. Co.* (C. C.) 84 Fed. 586; *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11 (23 Am. Rep. 1), and note; 1 Thompson, Negligence (2d Ed.) sections 77, 298, 497. But in the *Nesbit* case this court explains the *Payne* case and other cases like it as announcing the general rule that, where several persons are engaged in a common enterprise in the carrying on of which each is participating, the negligence of one of them may be imputed to the others.

It is the contention of counsel for appellant in this case that the common enterprise doctrine should be applied. We are satisfied, however, that the facts do not afford the slightest occasion for applying or even discussing the common enterprise rule. The deceased was not riding on the hose wagon in the prosecution of any common enterprise in which he and the other members of the fire department had voluntarily engaged, but in the pursuance of his individual duty as a member of the fire department and in that capacity a servant of the city. He had nothing to do with the selection of the driver, and he had no control over his acts. Under such circumstances it has been frequently held by other courts that there is no relation of common enterprise which would justify the imputation to the deceased of any negligence on the part of the driver of the hose wagon. See the following cases, which seem to be exactly in point: *Geary v. Metropolitan St. R. Co.*, 82 N. Y. Sup. 1016; *Bailey v. Jourdon*, 46 N. Y. Sup. 299; *Elyton Land Co. v.*

Mingea, 89 Ala. 521 (7. South. 666); *Birmingham R. & E. L. Co. v. Baker*, 132 Ala. 507 (31 South. 618); *Houston City R. Co. v. Reichart* (Tex. Civ. App.), 27 S. W. 918, on appeal 87 Tex. 539 (29 S. W. 1040).

The rules of the fire department offered in evidence had no bearing on this question. So far as appears from the record, the sections relate to the conduct of the driver and the captain or assistant chief, and they do not purport to authorize another fireman riding on the hose wagon to exercise any control over the driver. So far as they affect the conduct of the driver, even if admissible for the purpose of showing his negligence, they would not be material as affecting the deceased, in view of the conclusion just indicated that negligence of the driver was not imputable in any way to the deceased. The question as to the alleged negligence of the deceased himself in not looking out for the approaching car or endeavoring to avoid injury to himself from the collision was submitted to the jury in an instruction as to which no complaint is made. Counsel does complain of the refusal to give a specific instruction on this subject, but the instruction given sufficiently covered the one asked. In another requested instruction the doctrine of the last fair chance was invoked, on the theory that the evidence tended to show that the driver saw the car approaching in time to have avoided the injury, notwithstanding the negligence of the motorman in failing to stop or check the speed of his car; but such doctrine has no application here, as negligence of the driver would not be the negligence of deceased. We find no error in the record with reference to the question as to the exercise of reasonable care on the part of the deceased to avoid the injury.

IV. An instruction was refused in which the general rule was stated that the testimony of a witness in answer to hypothetical questions based upon the assumption of matters of fact is of no value whatever, if any one of the material facts assumed is not sustained by the evidence; but we

think that there was no occasion under the record for the giving of such an instruction. The only expert whose testimony was allowed to go to the jury was a motorman who had previously been in the employ of defendant, and the hypothetical questions propounded to him related to the distance within which a car could have been stopped with certain appliances and under certain conditions. Counsel does not call our attention to any conflict in the evidence as to the appliances or conditions referred to in the questions, nor does he claim that there was a want of evidence as to such appliances or conditions. There was no occasion, therefore, to instruct the jury on this subject.

Another witness, who had been at one time a motorman, was asked with reference to the distance within which a car could be stopped with the use of a different kind of con-

9. ADMISSION OF
EVIDENCE:
prejudice.

troller than that in use on the car which collided with the hose wagon; but subsequently, on the request of counsel for plaintiff, who had introduced this witness, his testimony was stricken out, and in an instruction the jury were directed to disregard it. The circumstances attending the offer of this evidence, as appears from the record, were somewhat peculiar, and, if counsel for plaintiff had in fact got before the jury the opinion of this witness on a matter on which there was no other evidence, we might, perhaps, feel inclined to say that prejudice was not removed by the action of the court in striking it out and directing the jury to give it no consideration. But, as a matter of fact, after the witness had fixed a shorter distance than that fixed by the expert witness previously testifying as to the time within which the car might have been stopped, he changed his testimony so that it substantially accorded with that of the previous witness and furnished corroboration only, and not new or different testimony on that point. Under such circumstances we cannot think that there was any error resulting from the admission of the testimony of the witness which was not fully cured by the action of the court.

Neither before nor after the testimony of this witness was stricken out was there any real conflict in the evidence on the subject. At least, counsel does not call attention to any such conflict, nor indicate in any way how prejudice could have resulted, and, in the absence of any suggestions that there could have been prejudice not removed by the action of the court, we are not called upon to interfere; for we must assume, in the absence of anything in the record to lead to a contrary conclusion, that the jury accepted and followed the directions of the court in the matter.

V. The refusal of the court to give an instruction to the effect that, in determining whether plaintiff's intestate was guilty of contributory negligence, the jury should not, under the facts and circumstances disclosed by the evidence, take into account or consideration the instinct of self-preservation, is complained of. But, as there is nothing in the record to indicate that the attention of the jury was in any way called to that doctrine, the refusal of the instruction was certainly not error. Plaintiff had not in any way suggested to the jury that there was any presumption that deceased was acting in accordance with such an instinct, and we are not to assume that the rule of law on the subject was known to the jury, or would be improperly applied by them at their own instance without their attention being called to it.

For the errors pointed out in the first division of this opinion, the judgment is *reversed*.

S. H. CROFT, Appellee, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

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Change of venue: PUBLIC PREJUDICE. A motion for change of venue is addressed to the discretion of the trial court and the appellate court will not interfere unless an abuse of its discretion is made to appear. In the instant case the overruling of a motion based on the prejudice of the community is not disturbed.

Same: REVIEW OF APPLICATION FOR CHANGE OF VENUE. The Appellate
2 Court in reviewing an application for change of venue based
on prejudice of the community will not consider the record
of the examination of the jury impanelled in the case.

Jurors: QUALIFICATION. A challenge to a juror should be over-
3 ruled where it appears from his examination that he has not
formed or expressed an opinion on the merits of the case, or,
does not show such a state of mind as will preclude him from
rendering a just verdict. From the examination in the instant
case it is held that disqualification is not shown.

Loss of services: VALUE: EVIDENCE. In an action by the husband
4 for loss of his wife's services, a witness, who, as the head of a
family, has for several years been in a similar station in life
with that occupied by plaintiff, may testify to the value of
services similar to those rendered plaintiff by his wife, basing
his judgment on his experience and observation, even though
such damages may not be the subject of expert testimony.

Admission of evidence: PREJUDICE. Prejudice will not be pre-
5 sumed from the admission of incompetent evidence which is
stricken on motion, though without comment by the court,
when there is other competent evidence on the subject which is
not denied. If comment of the court upon the ruling is nec-
essary counsel should request it.

Evidence: LIFE TABLES: EXPECTANCY OF FEMALE. Where a life
6 table is introduced for the purpose of showing expectancy at
certain ages, with no reference therein to sex, it is compe-
tent evidence on the expectancy of a female.

Same: INSTRUCTION. An instruction which authorizes the con-
7 sideration of a life table, in connection with other proven facts
and circumstances, is not objectionable as arbitrarily basing the
expectancy on such table.

Same. Where no direct attempt is made to show the life ex-
8 pectancy of the husband, suing for loss of services of the
wife, and the record discloses that there is not considerable
disparity between their ages, error can not be predicated on an
instruction which makes no reference to the expectancy of the
husband.

Railroads: NEGLIGENCE: ASSUMPTION OF RISK: EVIDENCE: INSTRU-
9 TION. In an action by the husband for injuries to his wife
while assisting him in the performance of his duties in de-
fendant's railway station, the evidence is held to show a de-
teriorating condition of the track at the place of injury from
the time she commenced her service in the station; a negligent

operation of a train at that point resulting in its derailment and the destruction of a portion of the station, thus causing the injury; and that she did not assume the risk of defendant's affirmative negligence in either respect.

Same. A railway company, knowing that the wife of its agent is assisting him in his duties in the station is bound to expect her presence, and must exercise reasonable care in the operation of its trains to protect her from injury while so engaged.

Same: CARE AS TO CHILDREN. Where a railway company gives over a portion of its station to the agent for residence purposes, knowing that he is the head of a family, it is bound to know that he has one or more children and is held to the same care with respect thereto as though it had actual knowledge that the family included children.

Same: RECOVERY FOR INJURY TO CHILD. A parent, who, with knowledge of the owner is rightfully in a building presenting in itself no inherent danger may recover for an injury to his child, with him on the premises, caused by the active negligence of the owner from without whereby the building is demolished.

Appeal from Muscatine District Court.—HON. D. V. JACKSON, Judge.

WEDNESDAY, NOVEMBER 14, 1906.

REHEARING DENIED, MONDAY, MAY 20, 1907.

ACTION to recover damages growing out of a railway accident. From a judgment in favor of plaintiff the defendant appeals.—*Affirmed.*

Carroll Wright, J. L. Parrish, and Carskaddan, Burk & Pepper, for appellant.

E. M. Warner and Richman & Richman, for appellee.

BISHOP, J.—The accident out of which this action arose is the same as that upon which the case of *Laura M. Croft v. Railway*, 132 Iowa, 687, was based. The general circumstances of the accident are related in the opinion in that case, and we need not here repeat. This plaintiff was the

station agent of the defendant at Buffalo, and the husband of said Laura M. Croft. The facts of Mrs. Croft's injury will be remembered, and the additional fact may now be stated that the minor child of the Crofts, a girl about six years of age, who had gone into the office of the depot with her mother, was instantly killed in the accident. This action is brought by plaintiff to recover the expense incident to the funeral and burial of his child and for the loss of her services during the period of minority. In a second count he also seeks to recover the expense incurred by him in caring for his injured wife and his own time and service in attending upon her, the expense of like character which is certain for the future, and the loss of her service, past and future. The answer to each count was a general denial.

I. After answer, the defendant presented a motion for change of venue, and error is assigned on the action of the court overruling the same. The motion was based on prejudice of the citizens of the county, and was

1. CHANGE OF
VENUE: public
prejudice.

supported by the affidavit of one of the attorneys for defendant, being the attorney who tried the case of Laura M. Croft against the defendant in said county, and also the joint affidavit of seven citizens of said county, who aver that a strong feeling of hostility against the defendant has existed in said county for years; further that, in view of the wide notoriety which the Croft cases have attained in said county, and the comment affiants had heard and read thereon, they do not believe the defendant can have a fair trial in said county. This showing was met by the counter affidavits of two of the attorneys for plaintiff, supplemented by the joint affidavit of fourteen citizens of the county, who aver that no prejudice exists in the county against the defendant such as would prevent a fair trial. As well understood, a motion for change of venue appeals to the discretionary power of the trial court, and this court will not interfere unless a case of abuse of discretion is made to appear. We cannot say that a case of abuse

is here presented. The accident occurred in Scott county, and the actions were brought in Muscatine county. It is inevitable that an accident of the character of the one in question, and attended by the results such as are conceded to have followed, will provoke discussion and comment pro and con and both in print and by word of mouth. But it does not follow therefrom and of necessity that prejudice will so far permeate the citizenship of the county that, pursuing the usual methods, a fair jury cannot be made up to try the case. Certainly the belief of a few citizens who have read or heard comment unfavorable to the defendant ought not to be accepted as all-sufficient proof of the feeling prevailing in the county at large. It is true that in the *Laura M. Crofts* case two trials had already been had, and verdicts in large amounts returned, the first of which was set aside as excessive, and the second cut down on consent of plaintiff by the court on entering judgment. But this does not go far in proof of the fact that the citizenship of the county is so far dominated and controlled by prejudice that defendant cannot have a fair trial before a jury of the county. It must be assumed that the jurors who sat upon the former trials were in all respects qualified, and that the verdicts were predicated solely upon the view afforded by the respective trials; that the verdicts were excessive cannot be attributed, therefore, to popular prejudice from the influence of which, if it existed, the jurors were withdrawn.

Counsel for appellant have brought up the record of the examination of the various veniremen taken upon the impanelment of the jury in the present case, and we are asked to consider the same as tending to show popular prejudice in the county. Manifestly we cannot do this. The case is before us for the correction of errors, and, in considering the correctness of any particular ruling, we must go to the situation as presented to the trial court, and to that alone.

2. SAME: review
of application
for change of
venue.

II. Two of the veniremen called into the box were

challenged by defendant for cause after examination, and the challenges were overruled. It is claimed that here was error.

S. JURORS: qualification. One of the men, Thomas McSwiggin, answered that he had read about the accident, the case, and the verdict on the other trials; that he had also talked with his neighbors on the subject. He also said that he then formed an opinion which would require evidence to remove. He said, however, that his opinion would have no weight if he was selected as a juror; that he would not take it with him into the jury box, and he would not be affected by it in reaching a verdict. The other man, Louis Duge, answered that, at the time of the accident, he formed an opinion from what he heard as to who was to blame therefor. "I guess I could serve as a juror, and return a verdict without reference to anything that I heard." On cross-examination he answered: "I have slightly an opinion now. It would require some evidence to remove it." Further he said he "guesses" he could form a verdict from the evidence without giving any weight to the account of the accident printed immediately after the occurrence thereof. In answer to a question by the court he replied that at the present moment he had no definite opinion as to which side of the pending controversy had the right of it. In our view no error is disclosed. As far as here to be considered a venireman is subject to challenge only when "it appears he has formed or expressed an unqualified opinion on the merits of the controversy, or shows such a state of mind as will preclude him from rendering a just verdict." In the present case the answers of McSwiggin did not disclose an unqualified opinion, and this is also true as to Duge. Indeed, counsel for appellant do not contend otherwise. If subject to challenge, therefore, it was because a state of mind was disclosed such as in fairness unfitted them for service on the jury. We are not willing to agree with counsel that this conclusion is dictated by the examination of which the record makes disclosure. In this day, intelligence is demanded in

the jury box, and intelligent men read the newspapers, and discuss current topics with their neighbors. It would be strange, indeed, if opinions, superficial or qualified in character, should not be formed, based upon information thus acquired. And it will not do to lay it down as a rule that intelligent men thus conditioned are unfitted for jury service.

Moreover, every intelligent observer knows that, in the exceptional cases, the real disqualification can be charged more certainly to moral disregard, bottomed on interest, near or remote, or inherent personal prejudice, than to the formation of a merely superficial opinion. Stated in another way, an honest man, especially when reminded of his duty, may be expected to put aside opinion based on rumor or second-hand report, and do justice as the real facts of the case presented to him on the trial seem to demand. A dishonest man, and it is not necessary that the expression should be taken in an offensive sense, though cautioned, may not be expected to put aside his hearsay opinion, because, when formed, such opinion will in general accord — consciously or unconsciously — with personal self-interest or personal prejudice. Men of the class first above referred to should never be subject to challenge for cause unless from their own mouths they testify to their disqualification. When an examination discloses that in character a venireman belongs to the class last above referred to he should be dismissed at once. And the court is not restricted to the mere form of words in which the answers of the venireman are couched. His manner and appearance may be taken into consideration. Here, too, much must be left to the discretion of the trial court, and, as in other matters resting in discretion, its action will not be disturbed except a clear case of abuse is made to appear. Our views thus expressed find support in principle in the following authorities: *Anson v. Dwight*, 18 Iowa, 241; *Sprague v. Atlee*, 81 Iowa, 1; *In re Goldthorp's Estate*, 115 Iowa, 430.

We are united in the opinion that the respective examinations of the veniremen in question did not show disqualification calling for their dismissal. The answers of McSwigin were simple and straightforward, and brought him clearly within the rule of qualification. This may also be said of Duge. It is not material that, in giving his answers, the latter used the qualifying word "guess"—a word technically implying doubt. It is manifest from his answers as a whole that the form of expression used was merely a colloquialism. It was not intended to be understood in its literal or technical sense.

III. One Boos, a witness called by plaintiff, made answer that he was a married man and for several years had been the head of a family. From his answers it also ap-

4. Loss of serv-
ices: value:
evidence.

peared that his station in life was quite similar to that occupied by plaintiff. He was then given the case of a wife 34 years of age, healthy and able to do the work of her family, 'consisting of her husband and two children, the husband residing at Buffalo, Iowa, and earning \$55 per month and house rent, and therefrom he was asked to state what would be the value per year of the services of such a wife to her husband. To this the defendant objected for the reason that the witness had not shown himself competent to answer; also that the subject was not one for expert testimony. The objection was overruled. On cross-examination the witness stated that his answer as to value was based on observation; that he had not made a special study of the subject. And further: "It is my opinion, based on what I consider a wife's services worth, provided I was in his position." Thereupon defendant moved to strike out the testimony of the witness in chief for the reasons stated in the objections, and for the further reason that it had now been made to appear that his answer as to value was merely the expression of an opinion. And this motion was overruled. Counsel for appellant strenuously contend that herein was reversible

error. We are not disposed to concur in this view. It may be conceded that the extent of the damage sustained by plaintiff by reason of the loss of his wife's services was not a subject for expert testimony. There was no question of science or skill involved in the inquiry. But it is manifest that the value of the services of a wife to her husband can have no market value. This, of course, does not defeat a recovery and hence it is that if proof on the subject be attempted it must be through the evidence of witnesses possessing the qualifications of observation and experience. In the very nature of things there could be no other basis of qualification. And, *ex necessitate*, the evidence of a witness thus qualified could be no more than an opinion, or rather a conclusion drawn from his observation and experience. As said in *Haight v. Kimbark*, 51 Iowa, 13, "statements of value are always more or less matters of opinion except in questions concerning market value. This is one of the established exceptions to the rule prohibiting witnesses from giving opinions. The value of property cannot be satisfactorily proved in any other way." For cases presenting varying states of fact to which the exception has been applied, see *Sater v. Railway*, 1 Iowa, 386; *Dalzell v. City*, 12 Iowa, 437; *Lanning v. Railway*, 68 Iowa, 502; *Wyman v. Railway*, 13 Metc. (Mass.) 310; *Barnum v. Bridges*, 81 Cal. 604 (22 Pac. 924). See also, 12 Am. & Eng. Ency. 475. It may be, as contended for by counsel for appellant, that the jurors in the box were as well able to determine the question of value as was the witness. But this must be upon the presumption that all were married men in comparatively the same walk of life, and possessed of observation and experience. Or, we must presume that the services of all wives are not only uniform in value, but that such value is matter of common knowledge. We have nothing before us upon which to base any such presumption.

IV. One Clark, a resident of Buffalo, and a witness for plaintiff, was permitted to testify over the objection of

defendant, that a short time before the accident, and while on a train with the superintendent of the railway division, he had told such superintendent that Mr. Croft expected to leave the station; that upon being asked why, he had replied that Croft was complaining that the work was too hard, and the salary too small. Further, that he called the attention of the superintendent to the extent of the responsibility resting upon Croft, and that the company was not doing right by him; that to this the superintendent replied that he had never investigated, and had not thought about that. Being asked what was said about Mrs. Croft helping her husband in the depot office, he said: "I told him that without the assistance of Mrs. Croft he could not run that office at all and do it rightly." At the close of the examination the testimony thus received was stricken out on motion of the defendant, and this was in the presence and hearing of the jury. The contention for error seems to be two-fold: that the evidence was of such prejudicial character that the error in its admission was not cured by the ruling on the motion to strike; and that, in ruling, the court sustained the motion without comment. We say generally that error in the admission of evidence is cured by subsequently striking it out. *State v. Spurbeck*, 44 Iowa, 667; *Rea v. Scully*, 76 Iowa, 343. Conceding that the rule is not to be invariably applied, the situation here disclosed does not present grounds for an exception. No serious prejudice could have resulted from the jury being told by the witness that he had informed the superintendent that Croft was contemplating leaving the employ of the company. And as to the reference to Mrs. Croft, it was presumably the intention to get before the jury the fact of knowledge on the part of the superintendent that she was accustomed to assist her husband in his onerous duties. The other evidence in the case for plaintiff made it clear that the superintendent did know of the custom of Mrs. Croft, and of this there was no attempt at denial. If comment on the

5. ADMISSION OF
EVIDENCE:
prejudice.

ruling was necessary counsel for defendant should have requested it. This they did not do either at the time or later.

V. Complaint is made of several of the instructions given by the court in charging the jury, which instructions had bearing upon the relation existing as of the time of the accident between the wife of plaintiff and the defendant company. This subject was quite fully considered in our opinion in the *Laura M. Croft* case, to which we have made reference, and being satisfied with what is there said upon the subject in general, we have no occasion for further discussion in this opinion.

VI. Experience tables, showing the expectancy of human life, were introduced in evidence by plaintiff, over the objection of defendant, showing the expectancy of Mrs.

6. EVIDENCE: life tables: expectancy of female. Croft to be about thirty years from the date of her accident. In the thirteenth paragraph of the charge the jury was told that if plaintiff

was found entitled to recover he should be allowed damages for loss of services "for such time in the future as it is reasonably certain he will sustain in view of the nature of her injuries, her age, her reasonable expectancy of life as shown by the life tables, her health, habits of life, and all other facts and circumstances in evidence bearing upon the question." It is said that this instruction was erroneous for three reasons: (1) The life tables were not competent, as they do not purport to furnish the expectancy of life of a female; (2) the instruction arbitrarily fixes the expectancy of the life of the wife by the life tables; (3) the measure of recovery is made to depend solely on the expectancy of the wife, no heed being given in the instruction to the life expectancy of the husband. The record before us contains no more than a statement that the life tables were introduced showing the expectancy of life at certain ages. One objection thereto was that the tables did not tend to give the expectancy of a female. It is now said in argument that the tables did not purport to give such expectancy. We do

not take judicial notice of the statements contained in life tables, and in the state of the record before us we must assume that the trial court, after examining the tables, correctly held that they were admissible as bearing upon the expectancy of a female. Should we infer, however, that the tables were general in the sense that they made no reference to sex, we should still be disposed to hold that they were admissible. Counsel present no reason for making any distinction as to longevity as between the sexes, and the barren record before us does not warrant a holding that there is any.

It becomes apparent at once on reading the instruction that the second contention for error is without foundation. The life tables are no more than referred to in the instruction

7. SAME: instruction. as one among other facts and circumstances in evidence bearing upon the question of expectancy. Conceding evidentiary value in any degree to the tables this was certainly proper. The case is unlike *Trott v. Railway*, 115 Iowa, 80, and other like cases cited and relied upon by appellant, in that the error there declared for arose upon an instruction, making the life table the sole test of expectancy.

As no attempt was made by direct evidence to show the age or expectancy of life of plaintiff, the third contention for error might under other circumstances present a question of

8. SAME. more serious import. Thus, it is probable that in a case, as supposed by counsel, of an aged husband and a youthful wife the expectancy of the husband should be taken into account in estimating his damages. But no such effect can be given here to reverse the judgment. In the first place, the question seems to be raised in this court for the first time. But aside from this, there is sufficient in the record to indicate that plaintiff was a man in middle life, and hence that there was no considerable disparity between his age and that of his wife. At least, the disparity was not great enough to suggest to defendant's counsel the propriety of an instruction on the subject, as it did not occur

to the court that such an instruction was necessary. Moreover, the matter in hand had relation solely to the amount of damages, if any, to be allowed. And as it is not any part of the contention of appellant for reversal that the verdict was excessive — the situation in that respect being tantamount to a confession that plaintiff is entitled to the full amount allowed, if entitled to recover at all — we cannot think the instruction carried prejudice.

VII. In the seventh instruction given the jury was told in substance that if plaintiff's wife was in the habit of going into the depot office to assist her husband, and this was

9. RAILROADS:
negligence: as-
sumption of
risk: evidence:
instructions.

known to the superintendent and assented to, or, at least, that no objection was made thereto, then the position of Mrs. Croft would be that of a licensee; that as to her, as such licensee, defendant was under no obligation to change the condition of its track or to change the ordinary and customary manner of operating its trains, but it would owe her the duty of ordinary care, etc. In the tenth instruction the matters of negligence which it was incumbent on plaintiff to prove were stated to be the defective condition of the track as alleged, and the attempt to run a heavy train thereover at a high and dangerous rate of speed as alleged. The eleventh instruction followed, and we set it out: "Moreover if you find from the evidence that plaintiff's wife sustained to the defendant no higher relation as before explained than that of a licensee it must appear if the injuries complained of were the result of the condition of defendant's roadbed, or defendant's manner of operating its trains over said roadbed, that there had been a change in the condition of said roadbed or in the manner of operating trains thereover after plaintiff's wife commenced to use the ticket office, which change as to her constituted negligence."

Counsel for appellant point out these instructions as the law of the case, and they insist that inasmuch as there was no evidence showing any change whatever in the condition of

the roadbed or in the manner of operating trains after Mrs. Croft began work in the depot office, a verdict found contrary to such instructions should have been set aside. It will be observed upon comparison that the seventh instruction was substantially in the form of the fourth instruction given in the case of Mrs. Croft against the defendant, and in the third paragraph of our opinion in that case we discussed at some length the legal correctness thereof constructively and from the view point of its applicability to the general situation as disclosed by the record. We need not go over the subject again at this time. The correctness in all respects of the tenth instruction is nowhere doubted, and it could not well be.

It is upon the eleventh instruction that the argument of counsel is principally based. The thought of the instruction, manifest upon reading, is that Mrs. Croft must be held to have assumed the risk of the track conditions existing at the time of her entrance upon the premises, and of the ordinary and general manner of train operation by defendant thereover. And if no change took place in either of such respects constituting negligence as to her there could be no recovery by plaintiff. Confining ourselves to the line of the argument as made, we have the somewhat narrow question whether the evidence in the case warranted a finding of negligence as to plaintiff arising either out of a change in track condition or in the manner of train operation? It may be stated at the outset that there was evidence tending to show a defective track condition at the initial point of the accident, and there was evidence tending to show that the train in question was being run and operated at a high and dangerous rate of speed, in view of such defective track condition. And, further, the conclusion was warranted that the accident resulted proximately from a combination of those two causes. It is true that no change in the track condition was shown to have taken place as the result of a deliberate purpose directed to that end during the period — nearly a year — of Mrs.

Croft's occupancy of the depot. Nor was it necessary to plaintiff's case that there should be proof of a change as by design. If change for the worse there was, and the character and extent thereof was such as to have an effect on train operations, it was enough. Did the situation as presented by the evidence make disclosure of sufficient grounds upon which to plant a finding that a change had in fact taken place? To begin with, it cannot be presumed that the condition as of the day of the accident was the condition as of the corresponding day of the year previous. As a general rule presumptions do not relate backward. *State v. Dexter*, 115 Iowa, 678; *State v. Hubbard*, 60 Iowa, 466; *Sigler v. Murphy*, 107 Iowa, 128; 16 Cyc. 1052.

Of course, a case is made for a qualified exception to the general rule where the condition presented is such that it could not have existed save as the result of the previous operation of one or more active causes upon a passive object. Thus, as said in the *Hubbard* case, evidence of profound intoxication would, of course, be evidence that an intoxicated condition had existed, at least, for a short time." So, in the case of a piece of railroad track where an inspection discloses that the ties in considerable number are so rotten that the spikes have but little, if any, force to hold the rails in place, etc., quite naturally the presumption should be indulged that such condition did not come about on the instant. As applied to all such cases, the qualification attached to the exception to the general rule is as to time. Standing alone, the presumption cannot be made to relate back to any particular point of time. To that end the aid of extrinsic evidence is required. Now, in the case before us, the evidence tended to show that at the time of the accident the track at and about the place where the derailment of the train took place was "rather low, and, being soft weather, it was pretty wet and muddy there" that the ties were in part of soft and in part of hard wood, and many of them "punky," "shaky," and rotten, so much so that spikes driven into them

would not hold; that the space between the ties was only partially filled with ballast material. As universally known, it is a fact in nature that a condition of rottenness in wood is the result of gradual, progressive decay. And the process goes on more rapidly in soft than in hard wood, particularly where the piece in question is partially buried in earth — frequently wet — and the remainder exposed to the atmosphere. Having this fact in mind, and considering in connection therewith the further fact that many trains were being operated daily over defendant's line of road, the natural tendency of which would be not only to crush the ties as yielding to the process of decay they grew weaker, but to loosen the spikes by which the rails were secured, we think a finding for change in the track condition was not only warranted, but altogether irresistible.

So, too, we think there was ample grounds on which to plant a finding of a change in the manner of train operation. It is true, as contended for by counsel for appellant, that, on the trial of this case, no witness assumed to speak directly as to the rate of speed at which the train was running. But the jury had before it the facts of the accident, from which it appeared that the train was a lengthy and heavy one drawn by two engines, and that with one of the engines and all of the cars, save two or three, off the track, it ran about seven hundred feet before being brought to a standstill. Therefrom, and in view of the track condition, we think a finding of a high and dangerous rate of speed was warranted.

Now, general observation teaches that men do not ordinarily act in a reckless manner, or needlessly rush into situations fraught with danger to life and property. Due care is the rule, and a want of it the exception. The rule needs no more than the presumption for its support, while, to take a given case out of the rule, the grounds for exception must be established by evidence. This is true on authority as well as on reason. 1 Thompson on Negligence, section 190. Hence it is we sometimes say that negligence will never be

presumed from the mere fact of an accident. *Kuhns v. Railway*, 70 Iowa, 561; *O'Connor v. Railway*, 83 Iowa, 105; *Haden v. Railway*, 99 Iowa, 735. And no one will seriously contend that it can be established as by presumption that a prior course of conduct, proper within itself, was dominated by active negligence simply on proof that a subsequent act, like in character, was negligently performed. Thus, proof that on one occasion a locomotive engineer ran his train at a high rate of speed over a certain piece of defective track — and hence carelessly — does not of itself even tend to prove that he had acted similarly on one or more of his previous trips. And it would be illogical in the extreme to indulge in the presumption from the one careless act that other engineers running over the same track had been habitually given to like carelessness. So, in this case, we think the jury might well have presumed that the observance of due care, having in view the condition of the track, was the rule; that the running of this particular train over such track at a high rate of speed was so far out of the general course as to constitute a change in the manner of operation. That the jury might properly find, therefore, that there was negligence as to Mrs. Croft seems hardly open to debate. Whether it was strictly accurate to class her as a licensee, it being found that she was in the office by permission, express or implied, we need not be at pains to determine.

It is certain that the rightfulness of her presence being established by such finding, she cannot be held to have assumed any risk other than such as might arise out of ordinary train operation. She was not called upon
10. *SAME.* to expect injury resulting from an act of affirmative negligence. To paraphrase a maxim of quite general application, she had the right to act upon the presumption that the defendant would neither unexpectedly do a thing wholly unusual, or unexpectedly do a usual thing in an unusual manner. Under such conditions, the defendant was bound to expect her presence, and it was its duty to exercise

reasonable and ordinary care in the operation and conduct of its trains to protect her from injury, and a failure to do so would be negligence as to her. *Watson v. Railway*, 66 Iowa, 164; *Thomas v. Railway*, 103 Iowa, 649; *Carver v. Railway*, 120 Iowa, 346; *Nichols v. Railway*, 83 Va. 99 (5 S. E. 171, 5 Am. St. Rep. 257); *Pomponio v. Railway*, 66 Conn. 528 (34 Atl. 491, 32 L. R. A. 530, 50 Am. St. Rep. 124); 1 Thompson on Negligence, section 968.

VIII. In the ninth instruction the jury was told in substance that if they found from the evidence that it was necessary to the well-being of plaintiff's child that she be in the company of her mother when the latter

11. SAME: care as to children. was in the ticket office at work, and further that the presence of said child as a member of plaintiff's family, residing in the depot building, was known to defendant when it gave consent or failed to object to the presence and service of the mother in the ticket office, then the duty owing by defendant to the mother would be the measure of its duty to the child. Appellant complains of this as error. It is pointed out to begin with that the record does not disclose that defendant had any knowledge whatever as to the facts respecting plaintiff's family, as to the number of his children, if any, or their age. There is then the statement of the legal point that the age of plaintiff's child, and the necessity for its safety, could not have anything to do in determining the degree of care due from defendant to such child. It is true, there is no direct evidence of knowledge on the part of defendant respecting the presence of the child in the depot building. But it had given over a portion of the building to plaintiff for residence purposes, and this with knowledge that he was the head of a family. In this situation we think it was bound to expect that the family included one or more children, and, this being true, the same duty arose as though actual knowledge had been brought home to it.

Counsel for neither party has seen fit to present us with

brief or argument addressed to the legal point raised. We shall dispose of it, therefore, by simply saying that no authority has come under our observation for holding that where a parent enters by right into a building — presenting in itself no inherent danger — taking with him a child of tender years, the latter can have no right of recovery as against the owner of the building for an injury caused by the active negligence of such owner proceeding from without and whereby the building was demolished. On the contrary, there are cases holding that even a trespasser may recover for an injury thus brought about. And, clearly, it would be so if the owner knew or had good reason to believe that such trespasser was on the premises. We conclude that there was no error in the instruction of which defendant can complain. Other questions of error argued are either disposed of by what has already been said, or are without merit.

The conclusion follows that the judgment must be, and it is, *affirmed*.

N. T. BURROUGHS V. THE CITY OF CHEROKEE, IOWA, AND
E. F. WILKIE, Appellants.

Town plats: DEDICATION. Under the Code of 1873, the filing of a
1 duly acknowledged plat of an addition to an incorporated town conveyed the fee to the streets included therein, without an acceptance of the dedication by ordinance; and a plat so filed was not affected by the subsequent passage of a general ordinance requiring a submission to the council for its approval of all additional plats, since an ordinance of that nature was in excess of statutory power.

Same: ACCEPTANCE. While acceptance of the dedication of a town
2 plat need not be by ordinance, yet there must be some acts on the part of the municipality from which an acceptance may be inferred before it can be charged with the burden of care and the safety of the streets included therein.

Same. The recording of a plat is a tender to the town of a con-
3 veyance of the streets and alleys embraced therein and con-

134	429
134	161
134	164

134	429
138	433
138	438

134	429
140	111
140	579

134	429
144	547

tinues, for a reasonable time, until either withdrawn or accepted; and what is a reasonable time depends upon the circumstances of each case.

Streets: ABANDONMENT: ESTOPPEL. While mere non-user for a
4 period of ten years will not estop a municipality from asserting its right to a dedicated street, yet, where there has been such non-user for not less than the statutory period accompanied by notorious, individual possession, under a claim of right, the public will be presumed to have abandoned its right.

Town plats: ADDITIONS: ACCEPTANCE BY MUNICIPALITY. The adop-
5 tion of an ordinance directing the construction of a sewage system along the streets of an addition will constitute an acceptance of the streets and alleys contained within the plat.

Same: ACCEPTANCE: EVIDENCE. The evidence in this action,
6 brought to enjoin a city from interfering with plaintiff's possession of certain alleged public streets, is reviewed and held insufficient to show an intention on the part of the city to decline an acceptance of the plat prior to the adoption of an ordinance providing for the future improvement of its streets.

Appeal from Cherokee District Court.—HON. WM. HUTCHINSON, Judge.

THURSDAY, NOVEMBER 15, 1906.

Rehearing Denied, Monday, May 20, 1907.

ACTION to enjoin defendants from interfering with plaintiff's fences across certain alleged streets. Decree as prayed. Defendants appeal. *Reversed.*

Wm. Mulvany and A. R. Molyneux, for appellants.

Herrick & Herrick and E. H. Hubbard, for appellee.

LADD, J. The plat of Burroughs' Magnetic Spring addition to New Cherokee was properly acknowledged and filed for record May 16, 1882, and this, under the statute then
in force, was "equivalent to a deed in fee simple of such portion of the premises platted as
1. PLATS: dedication. is on such plat set apart for streets or other public use."

Section 561, Code 1873; *Coe College v. City of Cedar Rapids*, 120 Iowa, 544. At that time New Cherokee was an incorporated town, and acceptance by ordinance was not essential. *Burlington, C. R. & N. R. Co. v. City of Columbus Junction*, 104 Iowa, 110, section 527, Code 1873. Nor is this conclusion obviated by an ordinance of New Cherokee, passed May 2, 1882, in which it was declared that "extension of the original plat of said incorporated town, or additions thereto, shall be illegal and of no effect or binding force on said incorporated town unless the plat of said addition or extension is submitted to the town council in said incorporated town of New Cherokee, Iowa, at a regular session thereof, and by said town council approved by resolution regularly passed by said town council." Chapter 12 of title 4 of the Code of 1873 provided for the platting of additions to incorporated towns and cities, and declared precisely what was necessary as conditions precedent to the recording of plats, and it was not competent for the town of New Cherokee to annex thereto additional requirements. This was clearly in excess of its authority. A municipality cannot exercise a power unless it is expressly conferred by the Legislature or necessarily implied in order to carry out powers expressly conferred. *Des Moines v. Gilchrist*, 67 Iowa, 210; *Keokuk v. Scroggs*, 39 Iowa, 447; *Brockman v. City of Creston*, 79 Iowa, 587. As the entire subject of platting had been fully covered by the general statutes, without the aid of municipal councils, the passage of the ordinance was in excess of the powers which the town of New Cherokee might exercise, and was therefore void.

But it does not follow, although appellants so contend, that no acceptance of the proposed dedication was necessary. There are authorities to the effect that a statutory dedication

2. SAME: without acceptance vests title to portions of
acceptance: a plat set apart for public purposes in the
streets. municipality. This is on the theory that the plat, being
recorded, may be relied upon by the public until the same

has been canceled by an act of equal solemnity and authority, and that, as the statute has provided for a vacation of the plat, until this has been done the fee of the streets and alleys should be deemed to rest in the town or city. *Baker v. St. Paul*, 8 Minn. 491 (Gil. 436); *Brown v. Carthage*, 123 Mo. 10 (30 S. W. 312); *City of Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540; *Town of Lake View v. Le Bahn*, 120 Ill. 92 (9 N. E. 269). It seems that under these authorities the burden may be cast upon the municipality, without its consent, to keep streets and alleys so dedicated in repair, and that liability will attach for personal injuries resulting from the neglect so to do. *Denver v. Clements*, 3 Colo. 472; *Osage City v. Larkin*, 40 Kan. 206, (19 Pac. 658, 10 Am. St. Rep. 186, 2 L. R. A. 56). An examination of the statutes construed in these decisions, however, will indicate that they provide in effect that the recording of the plat shall operate to vest title in the city. Under our statute the filing of the plat is made equivalent to a deed in fee simple to the streets and alleys, but, like other deeds, requires acceptance, before it can be effective in conveying the title and casting the burden upon the municipality for the care and safety of the ways proposed. That this was so intended by the Legislature is settled conclusively by the statute exacting such an acceptance on the part of a city by the enactment of an ordinance, and also by the provisions for a vacation of a plat prior to the sale of any lots. Section 563, Code 1873. And such seems to have been the opinion of this court for many years. *Bell v. City of Burlington*, 68 Iowa, 296; *Johnson v. City of Burlington*, 95 Iowa, 197; *Town of Cambridge v. Cook*, 97 Iowa, 601; *Updegraff v. Smith*, 106 Iowa, 385; *Brown v. Taber*, 103 Iowa, 2; *Blennerhassett v. Forest City*, 117 Iowa, 680.

The recording of the plat is a tender of the conveyance of portions set apart as streets and alleys for such use to a municipality, and continues until shown to have been with-

drawn. The law points out the procedure necessary to vacate the plat of record, and, until this has been done, or circumstances indicate to the contrary, the proprietor is presumed to continue his invitation of public acceptance and improvement. Ordinarily tracts which are platted are at some distance from the populous portions of the town or city and the proprietor, in offering to change his property from rural to urban, must be presumed to anticipate some delay in the acceptance and improvement of the streets and alleys separating the lots and blocks. When sparsely settled, years may elapse before the necessity will arise for grading or otherwise improving the streets, and until then the public ought not to be deprived of the right to accept them. However, delay may be for so long a time and under such circumstances as to indicate the abandonment of any intention to accept, and so it is quite generally held that acceptance must be within a reasonable time. *Sarvis v. Caster*, 116 Iowa, 707. What is a reasonable time will always depend upon the circumstances in each particular case. The proprietor, in recording the plat, proposes to the public that the ground represented as streets shall forever remain open to be used for that purpose, and by sale of lots or blocks with reference to the plat he precludes himself from making any other disposition of the streets. Ordinarily but part of the streets will be required for use for many years, depending upon the development and growth of the particular locality. As the proprietor receives ample consideration for his property in the sale of lots to others, he has no ground for complaint of delays in improving the ground dedicated to the public use. *Meier v. Portland Cable R. Co.*, 16 Or. 500 (19 Pac. 610, 1 L. R. A. 856). In *Taraldson v. Incorporated Town of Lime Springs*, 92 Iowa, 187, and *Backman v. City of Oskaloosa*, 130 Iowa, 600, the acceptance was more than ten years subsequent to the filing of the plat. In *Shea v. City of Ottumwa*, 67 Iowa, 39, the ground dedicated for the street

was rough and hilly, and it was held that the city was not too late in accepting it thirty years after the dedication. In *Mayor, etc., of Baltimore v. Frick*, 82 Md. 77 (33 Atl. 435), the court held that it is not necessary that the street be used within any limited time, in the absence of a condition to that effect, and that an acceptance twenty-three years after the filing of the plat was timely. The lapse of time alone has not been such as to indicate a purpose not to accept ultimately as streets the grounds set apart for that purpose in the plat filed. Does the delay therein, when considered in connection with other circumstances, so indicate? In *Uptagraff v. Smith*, 106 Iowa, 385, the proprietor had kept the land platted inclosed by fence and had cultivated the ground set apart for streets for more than ten years, for eight or nine of which the town had levied and collected taxes thereon, and he was held entitled to a decree quieting title against the incorporated town of Minnewaukon. In *Blennerhassett v. Incorporated Town of Forest City*, 117 Iowa, 680, the plaintiff with her husband had fenced an alley, set out trees and shrubbery established a private driveway therein, dug a well, built a summer house, and otherwise made use of it as a part of the abutting lots, since prior to 1880. During that year there was an attempt, though irregular, on the part of the town to vacate the plat. Nineteen years afterwards the city demanded that the obstructions in the alley be removed, and the court held, in an action to enjoin interference with plaintiff's possession, that the city was estopped from claiming the ground as a public alley. See *Corey v. City of Ft. Dodge*, 118 Iowa, 748.

The subject of estoppel of the city or town to claim a street or alley for public use against one who has occupied it exclusively for private purposes was fully considered in

4. **STREETS:**
abandonment:
estoppel.

Weber v. Iowa City, 119 Iowa, 633, and the conclusion reached that where there has been a nonuser of a street or an omission to accept ground dedicated for a street during a period of more than ten years, through-

out which the original proprietor or his grantees have been in actual, exclusive possession under claim of right, without interference or protest on the part of the officers or the public, the municipality is estopped from asserting that the ground constituted a street. After referring to the doctrine announced in *City of Waterloo v. Union Mills Co.*, 72 Iowa, 437, that the statute of limitations does not run against a municipality in such a case, it was there said:

This does not mean that a city may abandon all use of and control over a street, and stand idly by while it is closed to the public under a claim of private right, and subjected to use and occupancy as private property, and then at any time in the indefinite or remote future be heard to demand its reopening. There is no law which compels a city to open and improve a street which has been platted and dedicated to public use, nor any law which forbids the total abandonment or vacation of one which has already been opened. It is therefore well settled in this and most other States that, while mere nonuser for 10 years or more will not of itself operate to defeat the public title to a street, yet where there has been such nonuser for a long time — not less than the statutory period in ordinary cases — and this is accompanied by the actual and notorious possession of the land by an individual as private property under a claim of right, an abandonment will be presumed, and the public right in the street will be held to have been extinguished. . . . Practically speaking, the land has never been opened or subjected to public use as a street since its platting 56 years ago. This is concededly true for a period of 20 years immediately before the commencement of suit, during all of which time the defendant has been in actual, exclusive possession under claim of right, without protest or interference from the city, its officers, or the general public. This we have repeatedly held will work a loss of the public right, and the rule thus stated must be considered the law of this State. This, it must be remembered, does not apply to mere nonuser, where there is no actual possession under a hostile or inconsistent claim of right; nor will mere delay to assert a public right, in the absence of other circumstances raising an equity in favor

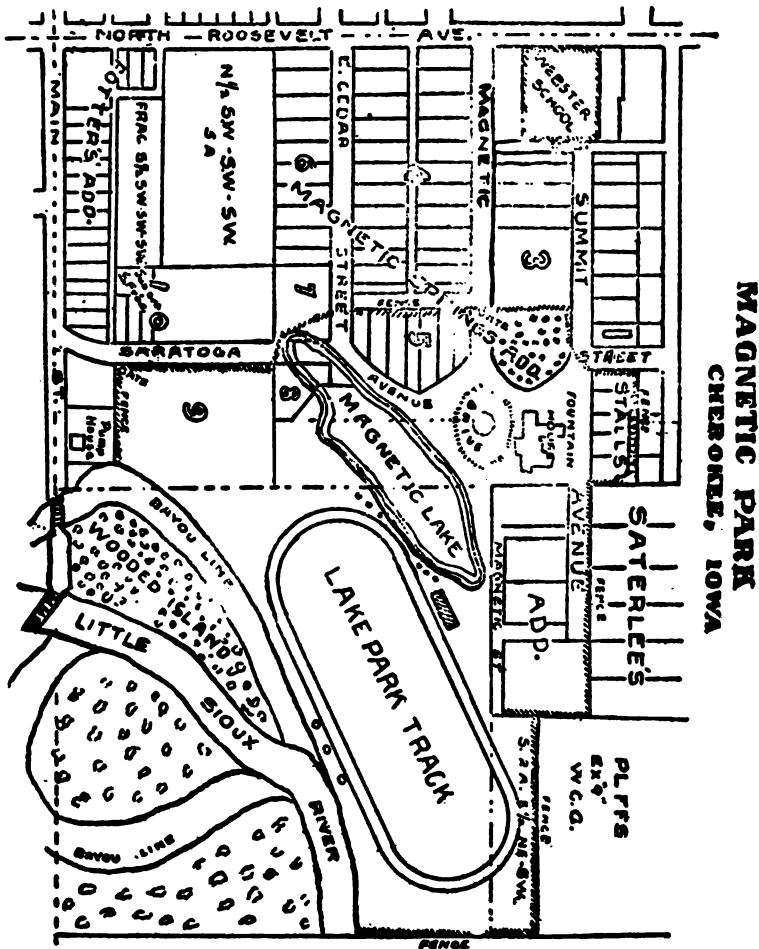
of an individual claimant, be sufficient to create an estoppel or establish an abandonment.

Technically speaking, there can be no abandonment of a street which has never been accepted. Not having obtained title or right to the ground tendered by the plat for that purpose, the municipality has nothing to part with save the mere right or privilege of acquiring the ground for street purposes. The loss of this right or privilege can be established only by proof of circumstances indicating a determination on its part not to avail itself thereof, and therefore in effect a refusal to accept, or which estop it from asserting the right; and this happens whenever there has been occupancy of portions of the plat set apart for public purposes by the proprietor or his grantees in a manner inconsistent with future use for such purpose and for such length of time as shall show acquiescence by the officers of the city or town in the permanent appropriation of the ground for other purposes.

Having stated the principles which must govern our decision, we first inquire whether the portions of the plat known as "Burroughs' Magnetic Spring addition to New Cherokee" set apart for streets have ever been accepted as such by the defendant or its predecessor, New Cherokee. Nothing has been expended thereon by the public in the way of work or improvements, and the dedication was not accepted by ordinance, unless this happened by virtue of the adoption of an ordinance establishing a system of sanitary sewerage in 1896 or 1897. For an accurate knowledge of the situation it is necessary to set out the map of the addition and other lands of plaintiff, prepared by J. S. Pingree, the county surveyor, and conceded by the parties to be correct. See following page.

The plaintiff, George W. Lebourveau, and R. B. Taylor joined in platting the addition in question May 16, 1882. Of this Burroughs owned blocks 1 and 2 to the center of Magnetic avenue; Taylor, blocks 4 and 16; and Lebourveau, blocks 5, 7, 8,

5. TOWN PLATS:
additions:
acceptance by
municipality.



9 and 10. This constituted the entire addition. The line of short cross-marks indicates the location of the fence. It was torn down where it crosses Summit, Magnetic, Park ("E. Cedar" on map), and Saratoga avenues, and the relief sought is a permanent injunction restraining the city from interfering with the plaintiff's fence at these localities. This necessarily depends upon whether it has the right to make use of the so-called avenues for street purposes. The ordinance referred to adopted certain profiles and plans and speci-

fications directing that sewerage pipes should be placed nearly the whole extent of Summit avenue, in part of Magnetic avenue, also a portion of Park avenue, which is designated on the map as "E. Cedar Street," and also through Saratoga avenue to its intersection with Park avenue. The plans also designated the location of pipes in the alleys. We think that this necessarily contemplated the use of these streets and alleys as such by the city, and that the enactment of the ordinance contemplating the improvements indicated was equivalent to an acceptance of these streets and alleys by the city. To accomplish this it was not necessary that the acceptance be indicated by express words. The enactment of any ordinance showing a clear intention on the part of the municipality to recognize these strips of land as streets and alleys constituted an acceptance within the meaning of the law. Thus an ordinance directing the public improvement of a street, such as will put it in proper condition for use by the public has been adjudged an acceptance. *Cohons v. Delaware, etc., Canal Co.*, 134 N. Y. 402 (31 N. E. 887). The adoption of the plans and specifications of the system merely provided for the laying of sewerage pipes in these proposed streets and alleys whenever the necessities of the neighborhood and municipality might require. In indicating their prospective location in such streets and alleys where, were these private property, the city would have no right to place them, but where, were they streets and alleys in fact, the pipes properly might be laid, the purpose of accepting the dedication by the council in adopting the system is too manifest not to be inferred. *In re Hunter*, 163 N. Y. 542 (57 N. E. 735, 79 Am. St. Rep. 616). It ought not to be thought that the council, in directing that sewers, when laid, should be placed in the spaces platted for streets and alleys, contemplated the illegal act of trespassing upon the grounds of another, but rather should the presumption prevail that in providing for sewers therein, as part of the city's system, it was the purpose of the council to recognize and treat such strips

of land as belonging to the city in trust for the use of the public as streets and alleys. As contended, the improvements contemplated have not been extended to this portion of the city. Nor was this necessary. The city was not bound to improve the streets immediately upon their acceptance. That was a matter within the discretion of the governing officers. This would have been true upon the most formal acceptance, and therefore is not ground for saying that the enactment of the sewer ordinance was not an acceptance.

It appears, then, that fourteen or fifteen years had elapsed from the recording of the plat to the time the city accepted the dedication of the streets. This alone would not bar such right, and our next inquiry is whether the circumstances are such that the inference may be drawn that the city, prior to such acceptance, had acquiesced in the use of the land proposed for streets for other purposes, and thereby abandoned the right to acquire them by acceptance for the public. Ever since the recording of the plat the parties have conveyed the lands by lots and blocks as numbered in the plat. Moreover, residences have been erected on several lots. Nathaniel Bruce has resided on lots in block 1 since 1883. W. H. Millard resided on lot 2 in block 3 for several years after 1889, since which time the house has been occupied by a tenant. There has been a residence on lots 1 and 2 in block 4 since 1885; on lot 5 in block 6 since 1891; on a strip on west side of block 7 since 1891. The south two hundred and seventy-three and one-half feet of block 10 has been platted into lots and disposed of by the purchaser. Plaintiff claimed to have acquired the seven lots of block 5 from Lebourveau, and explained their inclusion within his fence on this ground; but the record leaves no doubt of his mistake in this. He first became owner thereof under a conveyance from Job Leeds May 16, 1902, long after the acceptance by the city. Leeds obtained title thereto through mesne conveyance under Lebourveau. It will also be observed that each street mentioned, if plaintiff's contention be

accepted, will be a cul-de-sac, and those purchasing lots abutting thereon, relying on the existence of streets as indicated in the recorded plat, as they are presumed to have done, will have but one way of exit. Such a situation is a strong circumstance against the contention that the streets had been withdrawn. See *Dodge v. Hart*, 113 Iowa, 685.

But plaintiff contends that, notwithstanding the sale of lots according to the plat, the making of a cul-de-sac of each street, and the omission of the city to tax the streets and
6. SAME: acceptance: evidence. alleys for twenty years, his occupation of the land for more than ten years prior to the passage of the sewer ordinance was so inconsistent with the future use of any portion of it for streets that defendant should be held to have abandoned any purpose to accept the proposed dedication. Undoubtedly plaintiff improved the grounds included within the fence with a view of establishing a health resort. Water from a flowing well nearby was supposed to possess curative qualities. A large sanitarium was erected in 1882, shortly after the plat was filed, at the place on the map designated "Fountain House." This extended within between forty and fifty feet from the east line of block 3. An artificial lake of about two acres was excavated from the low ground and is designated on the map "Magnetic Lake." This has been abandoned for use as a lake for many years. The earth removed therefrom was used in leveling other portions of the premises and improving the driveways and track. Several thousand dollars were expended for this purpose. As appears, the lake extended across Saratoga Avenue, where it was five or six feet deep. How wide it was does not appear. A fountain was constructed in front of the sanitarium, and a row of evergreens placed around it. A sidewalk was constructed along the north side of Magnetic avenue, extending to the Fountain House, and from there down to and about the fountain. Between the block and the Fountain House it is similar to a street crossing. Trees were set out in other portions of the ground. A bridge was constructed

over the bayou to Woodland Island. The driveways were laid out and improved where the streets are designated on the map, save Saratoga avenue. All this appears to have been done prior to 1885. A temporary fence was constructed, as indicated on the map, in 1882, and remained there for some years. The Fountain House was used as a health resort for several years, later as a Keeley institute, and still later as a cancer infirmary. When not leased for these purposes, it was cared for by tenants. In 1890 the track was leased to the Cherokee Horsemen's Association for a period of five years, and, as a condition of the lease, plaintiff erected stalls for horses on certain lots and an amphitheater, and also a high board fence where the temporary fence formerly stood, except for a distance of about one hundred and eighty feet, where it was wire. During races or baseball games, or when a circus was held on the grounds, the gates were closed for the purpose of exacting admission fees. The grounds were also used for picnics and playing golf; but, until two years prior to the beginning of this action and long after the acceptance, were not closed to the public. Gates were maintained in Summit and Magnetic avenues and at the southwest corner of lot 9. These were usually left open in the daytime, and at night closed to prevent the escape of the tenant's stock. But, even when closed, any one choosing to do so was permitted to open them and drive through the grounds. There is some conflict between the testimony of plaintiff and his tenants concerning this; but from an examination of the entire record no other conclusion can be reached than that the gates were left open for the accommodation of any person wishing to drive through the grounds in the daytime and in fair weather. If closed, it was owing to the muddy condition of the roads, or at night by the tenant desiring to shut in stock which he might have upon the grounds. If the gates were open, the public made free use of the driveways. If closed, those desiring opened them and drove through. The mere fact that plaintiff continued in

possession of the premises was not inconsistent with the right of the city to accept the dedication of the streets and alleys. Nor do we think the erection of a fence, under the circumstances disclosed, inconsistent therewith. Until accepted by the city, the land set apart for streets and alleys remained the property of the proprietor and he had the right to the possession and use of the same, and, unless such possession and use was inconsistent with the future acceptance by the city, it did not indicate the purpose to appropriate the land for private uses. The public were at no time excluded from driving over the grounds. The driveways were where the streets were laid out, and were improved for the use of the public. We are of the opinion that the maintenance of these gates at Summit and Magnetic Avenues and the improvement of the driveways at the precise location set apart for streets is a strong circumstance rebutting any inference of use inconsistent with the dedication. Magnetic Lake extended into Saratoga avenue; but, in fencing, the plaintiff was careful not to exclude that portion of the avenue between blocks 9 and 10, and from this it may well be inferred that the excavation of the lake therein was not with the design of permanently appropriating the street.

But it is said that the location of the streets within the inclosure was not sufficiently definite. The dedication stated that the width "of each street and alley is as shown on the above plat. . . . There are stones planted at the intersection of the streets marked 'X'." A photograph of the plat introduced in evidence indicates the location of these stones at the intersection of the streets, one of them at the intersection of Park and Saratoga Avenue, and that Saratoga avenue passes from the south line of blocks 9 and 10 to the intersection of Summit avenue. It is regular up to the intersection with Park avenue, and then curves around block 5, and then around block 3, as appears from the plat. The space marked "Street" in block 1 is in fact lot 10, and was not dedicated as a street. The exact loca-

tion of Saratoga avenue around the end of block 3 is indefinite. But the plaintiff has set out trees in the end of said block and laid out the driveway subsequent to the dedication, thereby plainly indicating the place where the street was intended to be. Appellee's argument proceeds on the theory that Saratoga avenue extended no farther than the intersection of Park avenue; but it plainly appears from the map that the designation was intended for the street extending to the intersection of Summit avenue. It is also urged that the finding that this is a street would require the removal of the sanitarium, which admittedly extended 14 feet within the street line. As the building was erected shortly after the dedication, it must have been placed there by mistake; for surely the plaintiff cannot be said to have intended to appropriate land set apart for a street immediately upon filing his plat. Whether the public may interfere therewith is not now necessary to decide. *Klinker v. Schmidt*, 114 Iowa, 695.

Briefly recapitulating, we have to say that the only circumstances inconsistent with the city's right to acquire the streets by acceptance were the excavation of the lake across Saratoga avenue and extension of the sanitarium partly in the street. This last must have been by mistake rather than by design, as the building was erected about the time the plat was filed and the driveway laid out and improved. How the lake came to be so excavated there does not appear. It was done shortly after the plat was filed. Plaintiff did not include Saratoga avenue below it within his fence, as doubtless would have happened had he intended to permanently appropriate it. Nor ought he to be assumed, unless necessarily so, to have cut off the end of this street and created of it a cul-de-sac. On the other hand, there is the presumption that the dedication of the streets and alleys was tendered in good faith and not to be withdrawn immediately or as soon as the lots were disposed of. Nor ought it to be assumed that the proprietor, in improving his land, de-

signed, after selling lots according to the plat, to close the exits from the streets on which they abutted. And, even though no taxes were levied on the ground set apart in the plat for public use for twenty years, this ought not to be imputed to a purpose of the proprietor to evade a portion of the burdens of taxation. We prefer to adopt a theory more consistent with fair dealing, and to say that taxes were not levied or paid because the ground was not taxable; that in erecting the fence there was no purpose of permanently interfering with the streets on which the lots he had sold abutted, contrary to the representations on which sales were made; that in improving the driveways where the streets were laid out, in erecting gates therefrom into the side streets, and in allowing the public the uninterrupted use thereof up to the time of acceptance, the purpose was to hold them in readiness for the public whenever the municipality might choose to take them. We are of the opinion that the city, upon acceptance by the enactment of the sewer ordinance, acquired title to all the streets and alleys of the plat; and for this reason the court erred in restraining the removal of any obstructions placed therein.— *Reversed*.

IOWA SAVINGS & LOAN ASSOCIATION, Appellee, v. JAMES KENT, Appellant.

New trial. It was not an abuse of discretion to refuse to set aside a judgment and grant a new trial to a defendant who had appeared in the action, but before trial was compelled to enter a hospital for treatment, where it appeared that the cause was continued several times for his benefit and there was no showing that he had taken any of the usual precautions, which a man of ordinary prudence having a cause pending for trial would have taken.

Appeal from Polk District Court.—HON. JAMES A. HOWE, Judge.

MONDAY, NOVEMBER 19, 1906.

REHEARING DENIED, MONDAY, MAY 20, 1907.

THIS is an action to set aside a judgment rendered against the defendant and for a new trial of the case based upon unavoidable casualty and misfortune preventing an appearance by defendant to the original suit. The trial court denied the petition, and defendant appeals.—*Affirmed.*

McLennan & Brennan, for appellant.

Edgar C. Corry, for appellee.

DEEMER, J.—The original action was upon two promissory notes executed by defendant to plaintiff. Defendant entered an appearance to the action and filed a demurrer and a motion for a more specific statement. Stipulations were also entered into regarding the time when defendant should plead, and thereafter an answer was filed. The case was then sent to a referee by agreement of parties. This referee set the case for hearing on June 16, 1905. As defendant did not then appear, the hearing was postponed until June 23d, and defendant not then appearing, it was postponed until the 26th. Defendant did not then appear and the case was again continued until June 30th, but he then made no appearance, and another postponement was made until July 1st. Defendant did not then appear, and the referee refused to grant any further continuances. The case was then heard by the referee who found that certain credits should be made upon the notes and that plaintiff should have judgment for \$290.70. The report was confirmed and judgment was entered accordingly. Execution was issued upon the judgment on July 5th under which a levy was made July 6, 1905. This application to set aside the report of the referee and the judgment and for a new trial was made

and filed on the 14th day of July, 1905. The grounds for this as stated in the application are as follows:

(4) That in truth and in fact the defendant in this cause is a man of advanced years, being 64 years of age, and that for the past two years the defendant has suffered from a nervous disease known as 'locomotor ataxia,' and that prior to and on or about the 10th day of June, 1905, the defendant was severely stricken with said disease, and was compelled thereby to go to a private hospital in the city of Chicago, and that on or about the 10th day of June, 1905, and up to the 5th day of July, 1905, he was confined in a private hospital in the city of Chicago in the State of Illinois, and that during said time he suffered great physical pain and mental suffering, and to such an extent that it was practically impossible for him to attend to any business of any kind or character or even to inform his nearest friends and relatives of his whereabouts, and that he was advised by his attending physician to refrain from even the thoughts of all business concerns, and that during all of said time this defendant was practically incapable of attending to any business of any kind, and had he known of the fact that said cause was set for trial and hearing, it would have been utterly impossible for him to have attended in any form; that his first knowledge that this cause had been tried and judgment rendered was when he returned to Iowa after the 5th day of July, 1905, and that at once upon hearing that said cause had been determined, he wrote his attorneys, and came immediately to Des Moines.

This was verified by defendant.

It also appears that defendant's attorneys wrote him numerous letters between June 9th and July 1st, addressed to his usual place of residence at Marengo, Iowa, informing him of the days upon which the case was set for trial, and requesting him to appear and defend, but that they received no response until about July 10th. The matter of granting a new trial in cases of this kind rests peculiarly within the sound discretion of the trial court, and we are not justified in interfering save where that discretion has manifestly been

abused. *Callanan v. Bank*, 84 Iowa, 8; *Rogers v. Cummings*, 11 Iowa, 459; *Lundon v. Waddick*, 98 Iowa, 478. The trial court was justified in taking into account defendant's appearance, and in considering with great care his showing, for the reason that every effort was made to give him a hearing before the default was taken and judgment rendered. There was no showing that defendant took any of the usual precautions before leaving home for Chicago that a man of ordinary prudence having a case then pending for trial, would have taken; no showing that the letters addressed to him by his attorneys did not reach him or some of the members of his family, and no showing that his attack was such as to prevent his taking the usual precautions and using the ordinary prescience that any person of ordinary prudence would adopt before going to a hospital.

We are not disposed to interfere with the order denying the retrial, and it is *affirmed*.

EMMA BOND, Appellant, v. FLAVIL E. MILLIKEN.

Judgment for breach of promise: DISCHARGE IN BANKRUPTCY. An
1 action for breach of a marriage promise, in which there are no allegations of seduction or other wrong, is for a simple breach of contract and is not within the exception of the bankruptcy act providing that the discharge shall not release the bankrupt from liability on a judgment "for wilful and malicious injury to the person or property of another."

Appeal: REVIEW OF QUESTIONS NOT PRESENTED IN THE COURT BELOW.
2 A party cannot raise questions upon appeal which are not presented, either by the pleadings or proof, to the trial court.

Appeal from Hardin District Court.—HON. J. H. RICHARD,
Judge.

MONDAY, NOVEMBER 19, 1906.

REHEARING DENIED, MONDAY, MAY 20, 1907.

ACTION in equity to establish a judgment existing in plaintiff's favor against defendant as a lien on certain real property of defendant acquired since the rendition of the judgment. The defendant pleaded a discharge in bankruptcy subsequent to the rendition of the judgment, and asked, by way of cross-demand, that the judgment be canceled. On the trial the only proof introduced was the record on which the judgment was rendered, and the discharge in bankruptcy in the usual form. Thereupon a decree was entered for the defendant and the plaintiff appeals.—*Affirmed.*

F. M. Williams, for appellant.

J. H. Scales, for appellee.

MCCLAINE, C. J.—It appears from the record that the judgment which the plaintiff seeks to have established as a lien against the property of defendant was rendered in an action brought by this plaintiff against this defendant to recover damages for breach of promise of marriage, and is for the recovery of damages in the sum of \$3,000. on that cause of action. Two questions are presented on this appeal: First, as to whether the discharge in bankruptcy pleaded by defendant relieved defendant from liability for the damages recovered in that action, the claim on behalf of the appellant being that her claim is one of those excepted by the bankrupt act from the effect of the discharge; Second, that the discharge was not effectual because it was not made to appear, either in the allegations of the answer, or by the evidence introduced on the trial, that plaintiff's claim was scheduled among the liabilities of defendant in the bankruptcy proceeding, or that plaintiff had any notice or actual knowledge of such proceeding.

I. The contention that judgment for breach of promise of marriage is not within the operation of a discharge

under the bankrupt law is based on the second subdivision of section 17 of the bankruptcy act of July 1, 1898, chapter 541, 30 Statute 550 [U. S. Comp. St. 1901, page 3428], under which the discharge in question was granted, by which it is provided that the discharge shall not release the bankrupt from liability on a judgment "for willful and malicious injuries to the person or property of another." The action for damages for breach of promise is not only technically an action for breach of contract, but, in the action in which this judgment was rendered, was in fact only for breach of contract, for there were no allegations of seduction or other wrong. The allegations were that the defendant by "promises and artifices won the affections of the plaintiff, and she greatly became interested in the defendant and looked upon him as her future husband, but that the defendant, in violation of said promise and agreement [of marriage to plaintiff], wrongfully entered into marriage . . . with one Mary Rush and thereby placed it beyond his power to consummate and carry out his agreement with this plaintiff; that by reason of said wrongful act on the part of defendant the plaintiff has been outraged in her feelings, and humiliated in the estimation of her friends and acquaintances and suffered great mental anguish, agony, and mortification, by reason of which she has been damaged by the defendant in the sum of \$5,000." It is plain that, under these allegations, defendant could not have been held liable for any injury to plaintiff without proof of a contract of marriage, and that the sole damage which could be proven was the damage resulting from the breach of such contract. The allegation of subsequent marriage to another did not in any way change the nature of the cause of action. It seems to have been uniformly held, in cases involving the effect of a discharge in bankruptcy on a claim for breach of promise of marriage, that the claim is not within the exception of the bankrupt act above referred to. *Finnegan v. Hall*, 72

N. Y. Supp. 347; *In re Fife* (D. C.) 109 Fed. 880; *In re McCauley* (D. C.) 101 Fed. 223; *Biela v. Urbanczyk* (Tex. Civ. App.), 85 S. W. 451.

It is evident that the statutory exception referred to relates to torts and not to breaches of contract. See, for instance, *Tinker v. Colwell*, 193 U. S. 473 (24 Sup. Ct. 505, 48 L. Ed. 754), wherein it is held that a claim for criminal conversation is within the statutory exception and is therefore not released by discharge in bankruptcy. We are not concerned here with the question involved in some of the cases already cited as to whether the discharge relieves the bankrupt from liability for damages in an action for breach of promise of marriage in which seduction is alleged. It may well be that, although the action is technically for breach of contract, if there is seduction as an accompanying fact, the claim, so far as it is for the special recovery of damages due to the seduction, may be held to be a claim for willful and malicious injury to the person; and no doubt, under the amendment to section 17 of the bankruptcy act of February 5, 1903 (32 St. 798, chapter 487 [U. S. Comp. St. Supp. 1903, page 684]), which enlarges the exceptions from the effect of a discharge so as to include liabilities for the seduction of an unmarried female or for criminal conversation, the claim of damages for seduction in an action for breach of promise of marriage is reserved. But we have no question of that kind in this case, and are satisfied with the correctness of the conclusion of the trial court that the discharge relieved defendant from further liability to the plaintiff under her judgment, unless, for the reason discussed in the next paragraph of this opinion, the defendant has failed to make out a discharge with reference to this particular liability.

II. It is further contended that defendant was relying on the discharge and that he had the burden of showing that plaintiff's judgment was scheduled or that the plaintiff had notice or knowledge of the bankruptcy proceeding. See sub-

division 3 of section 17 of the bankruptcy act of 1898. In fact, however, defendant's discharge was set up in plaintiff's petition with the accompanying allegations that it was ineffectual because plaintiff's judgment was within the exception already referred to covering injuries to the person, and it is further alleged that for this reason the judgment remains a lien on defendant's land. Defendant had no occasion to allege or prove the scheduling of the judgment, for its effect was not attacked on that ground. In this court, for the first time, as it appears, plaintiff raises the point that the discharge was not effectual because the judgment was not scheduled. As plaintiff assumed the burden in the first instance of attacking the insufficiency of the discharge as to her judgment, she cannot rely on a ground of objection not raised and which defendant was not, therefore, called upon to disprove.

The decree of the trial court is *affirmed*.

WEAVER, J., takes no part.

CORNELIUS WILDER, Appellee, v. THE GREAT WESTERN
CEREAL COMPANY, Appellant.

134 451
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Negligence: EVIDENCE. Evidence of the usual and ordinary method

- 1 of fastening pile drivers is admissible in an action by an employé for injuries alleged to have resulted from negligently fastening it.

Evidence: CONCLUSION: PREJUDICE. Where nothing is involved in

- 2 the answer of a witness but his own volition it is a conclusion; but, if improperly excluded on that ground no prejudice arises where the matter is afterwards fully gone into with the same and other witnesses.

Negligence: FACT QUESTIONS. Ordinarily questions of proximate

- 3 cause, assumption of risk and contributory negligence are for the jury, and when properly submitted the finding of the jury will not be disturbed.

Master and servant: VICE-PRINCIPAL: NEGLIGENCE. A superintendent of construction work directed to procure a pile driver and arrange the same for use becomes a vice-principal, whose negligence in setting up the machine is that of the master, and the master is liable for an injury to a workman resulting from such negligence.

Assumption of risk: INSTRUCTION. The age and experience of a workman are proper matters to be considered in connection with the question of his assumption of risks incident to the use of machinery by which he is injured.

Personal earnings of minors. A minor cannot recover for time lost during his minority by reason of a personal injury, as his parents are presumptively entitled thereto.

Appeal from Webster District Court.—HON. W. D. EVANS, Judge.

MONDAY, NOVEMBER 19, 1906.

REHEARING DENIED, MONDAY, MAY 20, 1907.

ACTION at law to recover damages for personal injuries received by plaintiff resulting from his being thrown from the ladder of a pile driver operated by defendant, which, it is claimed, was insecurely fastened. Defendant filed a general denial and pleaded assumption of risk by plaintiff. It also pleaded that the negligence, if any, was that of a fellow servant, for which defendant was not responsible. Upon trial to a jury a verdict was returned for plaintiff in the sum of \$2,000. which, upon order of the district court, was reduced by a remittitur to the sum of \$1,850. for which amount judgment was rendered, and defendant appeals.—*Affirmed.*

Ryan, Ryan & Ryan, for appellant.

Healy Bros. & Kelleher, for appellee.

DEEMER, J.—Defendant is a corporation engaged in the manufacture of meals. It has a plant at Ft. Dodge,

which is in charge of various superintendents and foremen. Prior to the day when the accident occurred, plaintiff was engaged in work for defendant as a general roustabout. A Mr. Butts employed him, and one Pearson pointed out the kind of work he was to do. At the time of his employment and when he received his injuries he was nineteen years of age. On a Saturday night he was asked by Butts to help one Picord drive piles on the next Sunday, and, pursuant to request, reported for duty on that day. When he arrived the pile driver had already been set, and plaintiff was first engaged in sharpening piles and in moving the driver along on skids. From the uprights, through which the hammer played, was a ladder extending obliquely from toward the top down to the base of the appliance and at the top of these uprights, there was a trip which released the hammer when drawn up. For some reason the superintendent, Picord, in charge of the work, was having the hammer released before it reached the regular trip and he had a man upon the ladder with a crowbar to trip or release the hammer before it reached the top of the uprights. Soon after plaintiff came to work he was directed by the superintendent to relieve the man upon the ladder, to take the crowbar and to release the hammer as directed. Plaintiff went to the top round of the ladder and when the second pile was being driven, Picord, the superintendent, said to plaintiff, "Give her a good strike," which meant that he should allow the hammer to go up as far as possible before setting it free or "pinching it off" as it is called. When this order was given the horses which were drawing the hammer up with a rope and pulley, were driven farther away from the base of the pile driver than usual, and as they were so driven, the pile driver jarred and slipped in some way and the top tipped over toward the south in the direction of the horses, and, as plaintiff released the hammer, it jerked the upright back to the north and threw plaintiff from his position on the ladder to the ground, resulting in the fracture of one of his limbs.

It is claimed that the pile driver was not properly stayed, lashed, and fastened at the bottom, and that it was not sufficiently guyed at the top. Plaintiff testified that he had worked upon this driver three or four days before this accident, and that he did not know how it should have been erected and fastened. The negligence charged is in defendant's failure to furnish plaintiff a safe place to work, in that the appliance was not properly lashed or attached to stakes or other fastenings, and that there was an insufficient number of guy ropes, and that those in use were not properly fastened.

It does not appear that plaintiff had anything to do with procuring the pile driver, or with setting or caring for the same. His work was in the operation of the machine after it had been placed in position and with the piles which were being driven. Picord was superintending the operation of the pile driver, and was at the head of defendant's construction work. He was directed by one of defendant's superintendents to get the pile driver at the Chicago, Rock Island & Pacific Railroad yard in Ft. Dodge, to set it up and operate it, and to do everything that was proper in the setting up of the machine, and this Picord said he attempted to do. The appliance had but three guy ropes, and it was not lashed or fastened at the bottom. The reason given by Picord for not fastening it there was that it was not customary, and that he did not deem it necessary to do so, and that, if he had thought it necessary, he would have done so. At any rate, what is called the "mudsill" was not lashed down, and the jury was justified in finding that the accident occurred by reason of the failure of defendant's superintendent or foreman to fasten it down. The rope which drew the hammer up through the uprights ran through a pulley at the top, thence passed down the uprights under the ladder to what is called the "southwest corner" of the pile driver, where it passed through another pulley, and was then so arranged as that horses were hitched thereto, and they, by

moving in a southwesterly direction, pulled the hammer to the place where it was to be pinched off. The force thus applied was primarily to the base of the driver and in a southwesterly direction. A jury was justified in finding that the horses, in giving the extra pull, removed the appliance from its foundations and caused it to topple over as plaintiff and other witnesses said it did. There were, as we have said, but three guy ropes, one extending northward from the top of the driver and two to the southward, one southeasterly and the other southwesterly. These ropes were fastened it seems, although there must have been enough play either by reason of their elasticity or otherwise to allow the shifting of the appliance at the top. Picord gave directions as to where the hammer should be pinched off, and gave specific directions at the time the accident occurred, at least the jury was authorized to so find.

We can best consider the main points in the case by here quoting some of the instructions of the trial court which indicate the theory upon which it was tried. They are as follows:

(3) The relation existing between defendant and plaintiff at the time of the injuries complained of was that of master and servant, or employer and employé. Under the law it was the duty of the defendant, in the first instance, to use ordinary and reasonable care to furnish to the plaintiff a reasonably safe place to work, and reasonably safe tools with which to do the work appointed to him to do; that is to say, that the place, tools, and appliances should be reasonably safe when properly used.

You are instructed that, under the undisputed evidence in this case, the pile driver in use by the plaintiff and his fellow servants was a reasonably safe tool, and the ladder thereon was a reasonably safe place within the meaning of the law. If it be a fact that the pile driver and the ladder thereon became unsafe by reason of plaintiff's or his fellow servant's use of the same in an improper manner, such fact would not show a failure on defendant's part to perform its duty in the respect above stated. But it was also the duty

of defendant to use ordinary and reasonable care to furnish to the plaintiff and his fellow servants, known as the "pile driver gang," such tools, apparatus, and appliances as were ordinarily and reasonably necessary to enable them to use such pile driver in a proper and reasonably safe manner.

Additional instruction. In response to your request for further instruction of the question propounded by your foreman, I charge you as follows: That in so far as Picord was engaged in the work of using the pile driver, and the tools and the appliances appurtenant thereto, he was a fellow servant with the plaintiff. If you find, however, from the evidence that he was charged with the duty, in whole or in part, to procure or prepare the pile driver and the tools and appliances ordinarily and reasonably necessary for its proper use, then, to such extent, he was not a fellow servant, but was a vice principal — that is to say, for such purpose, he stood in the place of his principal, the defendant — and, if he was negligent in respect to such duty, the defendant is chargeable with such negligence. For instance, as stated to you in the previous instruction, the defendant was charged with the duty of exercising ordinary care to furnish the tools and appliances that were ordinarily and reasonably necessary for the proper and safe use of the pile driver. Now, if the defendant delegated that duty to Picord, or to any other person, and the duty was not, in fact, performed by the person to whom it was delegated, the failure of such person will be deemed the failure of the defendant, and the neglect of such person the neglect of the defendant; and in such case it is immaterial whether such person was in fact Picord or some other person, but the defendant is not chargeable with Picord's negligence, if any, in so far as he was engaged in the use of such tools and appliances as were actually furnished.

Before returning to these instructions, some of which are criticised, we shall take up some of the rulings on the admission and rejection of testimony. Plaintiff was permitted to show by various competent witnesses the usual and ordinary method of fastening such pile drivers as the one in question. This is claimed to have been erroneous. The authorities seem to

1. NEGLIGENCE:
evidence.

hold such testimony admissible. *Anderson v. Railroad*, 109 Iowa, 524; *Betts v. Railroad*, 92 Iowa, 343; *Austin v. Railroad*, 93 Iowa, 239; *Richardson v. Douglas*, 100 Iowa, 239; *Lawson* Expert and Opinion Evidence (2d Ed.), 74 and 115, and cases cited. Appellant's authorities upon this proposition are not in point. In one case a defendant was offering to show that it was not negligent because it did as others had done it before. See *Hamilton v. Railroad*, 36 Iowa, 31; *Metzgar v. Railroad*, 76 Iowa, 387.

It is said in argument that plaintiff instead of proving a general custom or usage was permitted to prove particular instances, but the record negatives this claim.

A witness who had testified upon direct examination that defendant had stakes, sledges, and chains near at hand, was asked, on cross-examination by defendant's counsel, if any one could have gone and got the sledges if he had wished and if there was anything to prevent him (witness) from getting them if he had wanted to. This was objected to as a conclusion, and the objection was sustained. As nothing seemed to be involved except the witness's own volition, this was no doubt a conclusion. But whether this be true or not no prejudice resulted for the entire situation was fully disclosed, not only by this witness but by many others.

II. Defendant filed a motion for a directed verdict based upon many grounds, one of which was plaintiff's failure to show that the alleged negligence was the proximate cause of the injury. The matter was clearly

3. NEGLIGENCE: fact questions. for a jury, and with its finding in this respect we are content. Another ground of the motion was that plaintiff had assumed the risk and was guilty of contributory negligence. These, too, were questions for the jury under proper instructions. Such instructions were given and no just complaint is lodged against them in so far as they cover this matter.

III. The main points in the case are the correctness of

the instructions already quoted, and whether or not defendant is to be held responsible for Picord's negligence in failing to anchor, guy, or fasten the pile driver.

4. MASTER AND
SERVANT: vice
principal: neg-
ligence.

Defendant contends that he was a mere fellow servant of plaintiff for whose negligent acts it was not responsible. On the other hand it is insisted that it was defendant's duty to furnish a safe place to work, and that this duty could not be delegated in such a way as to relieve itself from responsibility. We must assume, if for no other reason, because the trial court so instructed, that the pile driver was a reasonably safe tool, and that the ladder was a reasonably safe place, but it was also necessary for defendant to furnish such tools, apparatus, and appliances as were ordinarily and reasonably necessary to enable the persons engaged in the work to use the pile driver in a proper and reasonably safe manner. There was a conflict in the evidence as to whether defendant did furnish these things, but this was settled, or may have been, by the jury in its verdict. It may be, if the defendant furnished all the necessary appliances for the work, and the accident happened by reason of the neglect of a fellow servant to use them, that defendant would not be liable. This thought was presented by the trial court in its instructions. But in the additional instruction, above quoted, another theory of plaintiff's case was presented, which need not now be restated except in substance. It was to the effect that, in using the pile driver, plaintiff and Picord were fellow servants, but that, if Picord was charged with the duty of procuring and setting the pile driver, and of securing the necessary appliances, he was not then a fellow servant, and that his negligence in these respects would be the negligence of the defendant company. Does this announce the correct rule of law? If it does, then the main proposition in the case is settled in plaintiff's favor. Fairly stated, the question is this: Assuming that Picord was charged in whole or in part with procuring and preparing the pile driver and

tools and appliances ordinarily and reasonably necessary for its proper use, was he, in performing this work, a vice principal or a fellow servant? If the former, defendant would be liable for his negligence; if the latter, then it would not be. The other part of the instruction clearly says that, in so far as plaintiff and Picord were both engaged in the use of the appliance, they were fellow servants, and that defendant was not responsible for Picord's negligence in the use and operation of the pile driver. We have already referred to the testimony showing that Picord was directed to get the pile driver, to set it up, and do everything that was proper to drive the piles in the construction and erection of the appliance. Mention has already been made of the fact that there was testimony to the effect that Picord undertook to perform this work and that he did, according to his testimony, everything which he thought was necessary to secure the pile driver. He testified that he did not intend to lash or fasten it at the bottom because he thought it was not necessary to do so. He did not secure or provide the chains, ropes, stakes, etc., necessary to fasten it at the bottom, if these were necessary. Defendant manifestly delegated this work, which was, as to persons who were to work upon it, and who had no part in the erection thereof, not a fellow-servant duty, to Picord, and as it was clearly a masterial duty, defendant was undoubtedly liable for the negligence of Picord. Plaintiff had nothing to do with the erection and setting up of the pile driver. He went to it after it had been set up, to work upon it and had nothing to do, so far as the record shows, with its construction and erection. He was not then, in this respect, a fellow servant with Picord. For the proposition thus stated, there is an abundance of authority. Indeed, there seems to be scarcely a dissenting note in the cases. Picord, the vice principal, not only failed to secure and make the necessary fastenings, but the plan adopted by him was faulty, or at least a jury was authorized to so find. In such cases the master is clearly responsible.

In *D. Sinclair Co. v. Waddill*, 200 Ill. 17 (65 N. E. 438), we find this announced in the opinion:

The material to be used in its construction was selected and furnished by the appellant company, and *the plan of resting it partly upon the newly constructed embankment or loose dirt and partly beyond that embankment, and of supporting the projecting portion by the lumber provided for the purpose, was that of the appellant company, through its foreman.* It was a question of fact for the jury to determine whether, under all of the evidence, the structure gave way because it had been imprudently located, *negligently planned*, constructed of insufficient material, or hurriedly and recklessly overloaded, or whether the defects therein were occasioned by or through the negligence or lack of proper workmanship on the part of appellee. The appellee had neither experience in such work, nor knowledge of what would be required of the structure, and his actions were those of a servant in obedience to the commands of the master. The testimony so far tended to show the injury arose from the negligence of the foreman of the appellant company as to make that a question of fact for the jury — not of law for the court. Nor could the court have properly directed a verdict for the appellant company on the ground the appellee assumed the risk of the peril from which he received his injury. The risks assumed by a servant do not include such as arise from the negligence of the master, nor such as are unreasonable or extraordinary (*City of La Salle v. Kostha*, 190 Ill. 130 (60 N. E. 72), or from those which constitute a temporary peril created by the negligent, positive act of the master (*Fairbank v. Haentzsche*, 73 Ill. 236).

See, also, for a case very closely in point, *Grace & Hyde Co. v. Railroad Co.*, 112 Fed. 279 (50 C. C. A. 239), and *Foley v. Cudahy Packing Co.*, 119 Iowa, 246. From the latter case we quote as follows:

There is also evidence tending to prove that one Blondin was the foreman in immediate charge, and that, on the day of the accident, he was the only person present having charge of the work; that the planks were removed and used else-

where pursuant to his instructions. The witnesses who were workmen at the time testify that they received their orders from Blondin, and that he directed the manner in which the work should be performed. Without further reciting the evidence, we think sufficient appears to warrant the jury in finding that the defendant had delegated the performance of its duty to maintain a safe place to work to Blondin, and that his act in ordering the plank in question removed, was, in contemplation of law, the act of the defendant. The cases cited above in principle support this conclusion. See, also, *O'Neill v. Railway Co.*, 80 Minn. 27 (82 N. W. 1086; 51 L. R. A. 590), and notes; *McMahon v. Mining Co.*, 95 Wis. 308 (70 N. W. 478, 60 Am. St. Rep. 117); *Van Dusen v. Letellier*, 78 Mich. 492 (44 N. W. 572); *Ryan v. Bagaley*, 50 Mich. 179 (15 N. W. 72, 45 Am. Rep. 35); *Railroad Co. v. Peterson*, 162 U. S. 346 (16 Sup. Ct. 843, 40 L. Ed. 994); *Baldwin v. Railway Co.*, 75 Iowa, 297.

Beresford v. American Coal Co., 124 Iowa, 34, also clearly announces the rule. *Fink v. Des Moines Ice Co.*, 84 Iowa, 321, applies the same principle as also do, *Haworth v. Seevers Mfg. Co.*, 87 Iowa, 765; *Arkerson v. Dennison*, 117 Mass. 407; *Higgins v. Williams*, 114 Cal. 176 (45 Pac. 1041); *Blomquist v. R. R.*, 60 Minn. 426 (62 N. W. 818).

The instructions were based upon sufficient testimony and stated correct legal proposition. One of counsel's assumptions to the effect that the court instructed that the pile driver, in the manner it was fastened and used, was a proper appliance is erroneous. The trial court did not so instruct. It did say that the pile driver itself was a reasonably safe tool, and that the ladder was a reasonably safe place to work. But this had no reference whatever to the sufficiency of the fastenings, or to the manner of erection.

IV. In its instructions with reference to waiver and assumption of risk, the jury was invited to consider plaintiff's age and experience, as bearing upon his knowledge of the danger incident to the use of the pile driver in view of the manner in which it was fastened. This was undoubtedly correct.

5. ASSUMPTION OF
RISK: instruction.
tion.

The whole doctrine of assumption of risk is based upon appreciation of the danger and consent, express or implied, to assume the hazard. Plaintiff's age and experience were to be considered in this connection. The test made by the court was not, however, plaintiff's age in the concrete but abstractly; that is to say, the court left it to the jury to find plaintiff's knowledge from what a person of ordinary prudence of his age and experience should or ought to have known. This was clearly correct.

V. At the time of his injury, plaintiff was a minor, his parents still living. He did not arrive at majority until two years and fourteen days after he received his hurt. The trial court directed the jury to allow him for his loss of time during that period. This was erroneous for the reason that plaintiff's parents were presumptively entitled to his earnings during that time. This was cured, however, by the remittur filed by plaintiff. See *Union Merc. Co. v. Chandler*, 90 Iowa, 650; *Hulburt v. Hardenbrook*, 85 Iowa, 606; *Kliegel v. Aitken*, 94 Wis. 432 (69 N. W. 67, 35 L. R. A. 249, 59 Am. St. Rep. 901). But it is said plaintiff did not remit enough. The evidence clearly shows, however, that plaintiff lost but three months' time, and that he was earning but \$1.50 per day. After that he drew his usual wages. The error was fully cured by the reduction of the verdict.

VI. Lastly, it is argued that plaintiff assumed all risk of the dangers incident to the use of the pile driver. This was a question for the jury and was properly submitted to it. Some other matters are discussed, but they are not of sufficient importance to demand separate consideration. Suffice it to say that no prejudicial error appears.

The judgment must be, and it is, *affirmed*.

6. PERSONAL EARN-
INGS OF
MINORS.

H. H. ROBINSON, Appellant, v. SIDNEY LUTHER.

Specific performance: COMPENSATION IN DAMAGES. Specific performance of a contract will not lie where compensation in damages will afford adequate relief.

Same: DISCRETION: CONSIDERATION. Specific performance rests largely in the discretion of the court and will not be decreed except upon an application based on a valuable consideration.

Trial: TRANSFER OF CAUSES. Where the pleadings do not present a case for the specific performance of a contract the court may transfer it to the law calendar for trial.

Appeal from Boone District Court.—HON. J. R. WHITAKER,
Judge.

MONDAY, NOVEMBER 19, 1906.

REHEARING, MONDAY, MAY 20, 1907.

SUIT in equity to compel the specific performance of a contract, or, in lieu thereof, to recover damages.—*Affirmed.*

D. G. Baker, for appellant.

Dyer & Hull, for appellee.

SHERWIN, J.—This action was brought in equity to compel the specific performance of a contract; the petition in the first count thereof alleging that the parties entered into an oral contract by the terms of which the defendant agreed to do certain tiling on his own land for the purpose of furnishing the plaintiff an outlet for the water from his land; and the second count alleging that, in 1885, the grantors of the parties agreed to, and did in fact, construct an open ditch along the same course, which ditch the defendant has permitted his stock to fill and destroy. The plaintiff asks that

the defendant be required to construct the tile drain as per contract, or, if such relief be denied, that he be given the right to construct an open ditch upon the defendant's premises. The plaintiff also asks damages. On motion of the defendant the case was transferred to the law calendar, and the appeal is from that order.

It is a general rule that equity will not enforce the specific performance of a contract where compensation in damages will constitute adequate relief. *Richmond v. D. and S. C. R. Co.*, 33 Iowa, 422; *Bispham's Prin. of Equity*, section 364.

And it is a further fundamental rule that specific performance rests in the judicial discretion of the chancellor, and that the remedy of specific performance will not be administered save upon an application that is based on a valuable consideration. *Thurston v. Arnold*, 43 Iowa, 43; *Shaw v. Livermore*, 2 G. Greene, 338; *Harper v. Sexton*, 22 Iowa, 442.

It is manifest that the petition as a whole does not present a case for the interposition of equity. It is to be gathered therefrom that there had been an open ditch which had theretofore served the purpose for which the tile drain was intended, but that its effectiveness had been destroyed by the defendant's stock. So far, then, as that branch of the case is concerned, specific performance is clearly not the plaintiff's remedy because the petition alleges that the contract for the ditch was, in fact, fully performed. If the ditch when open, served the same purpose that the tile drain would serve, equity should not compel the defendant to tile the ditch at great expense for the sole benefit of the plaintiff. By the terms of the agreement to tile, the plaintiff was to tile about sixty rods on the defendant's land, and he alleges as the principal ground for specific performance that he bought material for the purpose of carrying out his part of the contract, but, if he did so, that alone would not entitle him to specific performance. The naked right to enter upon

the land of the defendant would amount to no more than a revocable license, and the mere purchase of material for which he could be fully compensated in a law action would not convert the transaction into an irrevocable license.

If the court was satisfied from the pleading that the plaintiff could not enforce specific performance, the transfer to the law calendar for a trial of the question of damages was proper. We think there was no error in the ruling, and it is *affirmed*.

J. C. DOOLEY, Appellee, v. C. H. CRABTREE, Appellant.

Election of remedies. The institution of a suit to rescind a contract for the exchange of properties on the ground of fraud, which is dismissed because of a misjoinder of parties and causes of action, is not an election of rights or remedies which precludes a subsequent action for damages for false representations.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.

TUESDAY, NOVEMBER 20, 1906.

Rehearing denied Monday, May. 20, 1907.

ACTION at law to recover damages for false and fraudulent representations made by defendant in the sale of mining stock. Defendant filed an answer containing several divisions and to one of them plaintiff demurred upon various grounds and his demurrer was sustained. Thereupon defendant elected to stand upon the pleading so attacked and refused to plead further. This appeal is from the ruling upon the demurrer.—*Affirmed*.

Warren Walker, for appellant.

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John Newburn, Gillespie & Bannister, and C. C. Cole,
for appellee.

DEEMER, J.—The division of the answer which was attacked by the demurrer pleads in substance the following facts: That defendant obtained from plaintiff certain real estate in exchange for mining stock; that thereafter plaintiff, claiming that his property had been obtained by fraud and false representations, undertook to rescind the exchange, and tendered defendant the stock received by him, plaintiff, and demanded a reconveyance of the real estate, stating that he elected to rescind the transaction; that defendant refused to accept the stock so tendered and refused to reconvey the real estate; and that thereupon plaintiff commenced an action in the district court of Polk county to recover said real estate; that the allegations in that petition were substantially the same as those made in this case; that that action was prosecuted in said district court and defendant was obliged to employ counsel to defend the suit, and was put to great expense in so doing. It is claimed that these facts constituted an election on the part of plaintiff to rescind the sale, and that plaintiff cannot now sue for damages on the theory that he suffered damages by reason of the exchange of properties.

As part of this division of the answer defendant set forth the judgment entry in the proceedings which he alleged constituted an election, from which it appears that, during the trial of a case brought against the Gladiator Consolidated Gold Mine & Milling Co., and C. H. Crabtree, defendant's counsel claimed that there was a misjoinder of causes of action in that plaintiff therein had stated a separate cause of action against each of the defendants and moved that the action be abated or dismissed, or, if this were denied, that plaintiff be required to elect as to which cause of action he would pursue. The motion was made on behalf of each party. Upon this motion the trial court held that there

was a misjoinder of parties and causes of action in that the action was against the company alone, but the prayer was for judgment against both defendants, and ordered that plaintiff's petition be dismissed at his costs. It is very clear that this judgment was not a former adjudication nor a bar to plaintiff's present suit except on the theory of an election of rights or remedies. There was no trial upon the merits and no judgment entered save a dismissal of the case because of misjoinder of parties and causes of action. Indeed, it is not contended in argument that the judgment in the original case amounted to such an adjudication as bars plaintiff of recovery in the present action. But it is argued that by filing the original petition for rescission plaintiff elected to disaffirm the contract, and that he cannot now be heard to say the contract was good, and recover damages for the breach thereof. It is insisted that when the alleged fraud was discovered plaintiff had the option of rescinding the sale and recovering his property or affirming the sale and recovering damages on account of the fraud practiced upon him, but that he could not do both and that when he elected to pursue the one remedy he "made his bed and must lie in it." This is the exact question presented by the demurrer as we understand it, although we might well refuse to consider it for the reason that most of the allegations in defendant's answer are mere conclusions of law and none of the pleadings in the original case are set out.

While the petition in this case is apparently to recover damages, it is nevertheless alleged that plaintiff tendered back to defendant the stock received by him and demanded the return of the property given in exchange, and further alleges that the stock received by him was of no value whatever, but that the property given by him for the stock was worth \$6,000. and he asked judgment for \$6,000. It is by no means clear that this amounted to an affirmation of the sale. It might as well be said to be an action to recover back the value of the property received by defendant upon

the theory that plaintiff had done all he could in the way of a rescission and that he was seeking to recover the value of his property upon the ground that there was no valid exchange. But, however this may be, plaintiff did not pursue his original action to a decree. It was dismissed for the reasons stated, and there was no attempt to adjudicate his rights in the premises. The ruling of the trial court upon the motion to dismiss was not appealed from and that ruling conclusively established the fact that plaintiff had mistaken his remedy or had so gone about it that he could not recover in the form of action adopted by him. Thereafter he brought this suit and is met with the pleading already stated. That the doctrine of election of remedies does not apply is well settled by our own cases. *Tyler v. Bowen*, 124 Iowa, 453; *Thorson v. Baker*, 107 Iowa, 49; *Smith v. Bricker*, 86 Iowa, 285. And that the doctrine of election of rights has no application is equally well established. *Lemon v. Sigourney Bank*, 131 Iowa, '79, and cases cited; *Zimmerman v. Robinson*, 128 Iowa, '72. The cases already cited clearly rule this one and satisfactorily point out the distinction to be observed between such as these and those relied upon by appellant.

It would be useless to further consider a matter already so fully covered by the cases cited.

Our conclusion is that the ruling upon the demurrer was correct, and it is *affirmed*.

J. C. DOOLEY, Appellee, v. THE GLADIATOR CONSOLIDATED
GOLD MINES AND MILLING Co., Appellant.

134	468
137	213

Corporate stock: CONVERSION. The assignee of corporate stock
1 may elect to treat the wrongful refusal of the corporation to register the transfer as a conversion thereof and recover the full value.

Same: EXTENT OF RECOVERY. Where refusal to register a transfer of
2 corporate stock amounts to conversion, the assignee may re-
cover the full value at the time of demand with interest to
the date of trial.

Market value. The market value of stock, in a suit for conversion,
3 is the price it was selling for on the market at the time of
conversion.

Transfer of stock: DEMAND: CONVERSION. Where the secretary of
4 a corporation refused to register a transfer of corporate stock
when properly presented for that purpose, but referred the as-
signee thereof to the general manager, who also refused, the
demand and refusal amounted to conversion, even though the
manager was not at the time in his place of business, to which
fact no objection was made.

Same: TENDER. After conversion of corporate stock by refusal to
5 register a transfer, a tender of performance during the trial is
not a defense to an action for the price.

New Trial: EVIDENCE. The fact that an assignee of corporate
6 stock subsequently voted the same is not ground for a new
trial, since that fact could not have been shown on the original
trial; nor is false swearing in itself ground for new trial.

Evidence of false swearing, if admissible, held insufficient to
warrant a new trial on petition.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.

TUESDAY, NOVEMBER 20, 1906.

REHEARING DENIED, MONDAY, MAY 20, 1907.

ACTION at law to recover the value of certain stock in
defendant corporation alleged to have been converted by it.
Trial to a jury. Verdict and judgment for plaintiff and
defendant appeals. After judgment had been entered, and
within a year thereafter, defendant filed a petition for a
new trial based upon newly discovered evidence, and an
alleged fraud by plaintiff in procuring the judgment. This
petition was denied, and from that order defendant also ap-
peals. *Affirmed.*

Warren Walker and Parsons & Evans, for appellant.

John Newburn and Gillespie & Bannister, for appellec.

DEEMER, J.—Plaintiff became the owner by purchase from the holders of three thousand five hundred shares of stock in the defendant company which shares were duly assigned to him by the holders thereof. After becoming the owner of said shares he presented the same to the officers of defendant company, and claims that he tendered the regular transfer fee, and demanded the transfer and issuance to him of a like number of shares of stock in the defendant corporation, which demand he says was refused, and he thereupon brought suit against defendant for the conversion of the stock. Defendant denied the material allegations of plaintiff's petition, but admitted that S. G. Hammons was president, W. N. McKay, secretary, and C. H. Crabtree, treasurer and general manager of the corporation. It further alleged that when plaintiff presented his stock to the secretary he stated that he would prefer to have said secretary refuse to make the transfer than to make it. Upon these issues and claims the case was submitted to a jury, resulting in a verdict for plaintiff in the sum of \$1,526.58. The first appeal is from the judgment rendered in the main case.

It is contended for appellant that no action at law will lie against a corporation for failure to make a transfer of stock upon its books, and *McLean v. Wright*, 96 Mich., 479 (56 N. W. 68), is cited as an authority for the proposition. That case apparently so holds. But it is based upon a statute of the State of Michigan that changes the rule which generally prevails. Under that statute a transfer upon the books of the company is not necessary to the validity of the purchaser's title. In that state certificates of stock pass by assignment the same as negotiable paper. That is not the rule in this jurisdiction. *Ottumwa Co. v. Stodghill*, 103 Iowa, 437; *Perkins*

1. CORPORATE
STOCK:
transfer:
conversion.

v. Lyons, 111 Iowa, 192, and cases cited. The great weight of authority is to the effect that an assignee of stock may, if he so elects, treat the wrongful refusal of a corporation to register the transfer of stock as a conversion thereof, and may sue for the recovery of its value. *Craig v. Land Co.* 113 Cal. 7 (45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316); *Bridgeport Bank v. New York, R. R.*, 30 Conn. 231; *Bond v. Mount Hope Co.*, 99 Mass., 505 (97 Am. Dec. 45); *Com. Bank v. Kortright*, 22 Wend. (N. Y.) 348 (34 Am. Dec. 317); *Durham v. Monumental Co.*, 9 Or. 41; *Rio Grande Co. v. Burns*, 82 Tex. 50 (17 S. W. 1043). An assignee may also at his election secure a transfer by action of mandamus. *Hair v. Burnell*, (C. C.) 106 Fed. 280. But he is not obliged to adopt this remedy. We need not quote from the cases cited. Suffice it to say that they fully sustain the rule announced.

II. Further claim is made that as plaintiff failed to show any depreciation in the value of the stock after the making of his demand nothing more than nominal damages

2. **SAME:** may be recovered. If the rule in Michigan
 extent of
 recovery. be correct, doubtless appellant's contention would be good. But if the refusal to transfer constitutes a conversion plaintiff may recover the full value of his stock at the time demand was made with interest to date of trial. *German Co. v. Sendmeyer*, 50 Pa. 67; *Ralston v. Bank*, 112 Cal. 208 (44 Pac. 476); *Pinkerton v. Manchester Co.*, 42 N. H. 424; *London Bank v. Aronstein*, 117 Fed. 601 (54 C. C. A. 663); *Rio Grande Co. v. Burns*, 82 Tex. 50 (17 S. W. 1043).

III. Several of the instructions are criticised, and complaint is made of the refusal to give certain requests made by defendant. What we have already said disposes

3. **MARKET** of most of these complaints. The ones un-
 VALUE. disposed of relate to the request for the transfer of the stock and to the instructions regarding market value. The instruction as to market value given by the

trial court was in exact accord with the one asked by defendant; that is to say, the trial court instructed that the market value was what the stock was selling for in the market at the time the stock was presented for transfer. There was no error here.

Plaintiff presented the stock purchased by him to the secretary of the company, and the testimony tends to show that he tendered the regular fees, and demanded a transfer of the stock. The testimony also shows, or at least the jury was authorized to find, that defendant's office was in a certain building in Des Moines, and that one Crabtree, in addition to being treasurer, was also general manager of the defendant corporation and as such in charge of its office and its books, and that shares of stock were there transferred. There is further testimony to the effect that, after the refusal of the secretary to make the transfer, plaintiff went to the general manager, Crabtree, who he found in front of his office, and then and there presented the certificates to him, and asked that they be transferred upon the books of the company, and that Crabtree then shook his head and said, "We cannot do that. We cannot transfer them." There was also testimony to the effect that, when plaintiff presented the stock to the secretary and demanded its transfer, the secretary refused to make it because Manager Crabtree told him not to, and that he (the secretary) then told plaintiff to take his stock to Crabtree and that he (Crabtree) would attend to it.

On this record the court instructed as follows: "And if you find . . . that the plaintiff presented the three certificates of stock in question to the secretary of the defendant, within business hours, at the office of defendant, or if not at said office then to the secretary in person at such place as you find he was located in said city, and that upon the presentation of said stock a request was made to said secretary to have the same transferred upon the books of the

corporation, and the said secretary refused to make such transfer, but referred him to the manager of defendant, one Crabtree, and you further find from the evidence that he proceeded to the office of said manager in said city of Des Moines, Iowa, and met the said manager, Crabtree, on the street in front of his said office, and made the demand for the transfer of said stock upon the books of the defendant corporation, which was refused, then you are instructed that the tender and request to have the stock in question transferred upon the books of defendant was a proper and legal tender and request, although the same was not within the office maintained by defendant." Under the circumstances disclosed there was no error in this instruction.

Nor did the court err in refusing defendant's fourth, fifth and sixth requests to the effect that the stock was not presented to a proper person or at a proper place. It was not necessary for plaintiff to invite the general manager across the threshold of his office before presenting the stock and demanding a transfer, where, as here, the manager made no objection to the time and manner of presentation, but absolutely refused to make the transfer requested. He waived a formal presentation and request inside the four walls of his office. *Heard v. Lodge*, 20 Pick. (Mass.) 53 (32 Am. Dec. 197). Under the circumstances no demand at the office of the company was required.

IV. During the trial defendant tendered plaintiff the certificates of stock which he had theretofore demanded. This was no defense to an action for the previous conversion of the stock. We shall not cite cases
5. SAME: tender. to so plain a proposition.

V. As to defendant's petition for a new trial. This was based upon two grievances: (1) That plaintiff, after obtaining his judgment, participated in a stockholders' meeting and voted the stock purchased by him, and
6. NEW TRIAL: evidence. (2) that he gave false testimony upon the trial of the main case regarding the value of his stock. It

is well settled that the matter of granting a new trial lies peculiarly within the sound discretion of the trial court. It is also the established rule of this court that the petition must allege a good defense to the action. Code, sections 4094 and 4096; *Tschohl v. Insurance Association*, 126 Iowa, 211. Whether this rule applies to a case where a new trial is sought because of newly discovered evidence we need not now decide. In so far as the application is based upon the grounds stated, the rule does apply, and as there is no allegation of a good defense in the pleading, and as the court must first determine whether or not there was a good defense to the action (Code, section 4096), there was no error in dismissing the petition. Moreover, the fact that, after plaintiff had obtained his judgment, he voted the stock purchased by him could not have been shown on the original trial, and is therefore no ground for a new trial by petition. As to the alleged fraud and false swearing, it is now the rule of this court that perjury or false swearing is not in itself sufficient fraud to justify the granting of a new trial. See *Graves v. Graves*, 132 Iowa, 199.

The original case was tried in May of the year 1905, and in that case plaintiff gave testimony as to the market value of the stock. On the hearing of the petition for a new trial, testimony was given to the effect that plaintiff appeared before the grand jury in Polk county, and then and there gave evidence to the effect that he had in March, 1904, examined the physical property owned by defendant, and found that it had no title thereto, and that Crabtree had made false representations regarding the nature, character, and extent of the property. This testimony was given after the trial of the case, and of course, could not have been given on the main trial. It is claimed, however, that it showed plaintiff's knowledge of the property at the time he gave his original testimony, and should be considered for that purpose. The difficulty with this is that the plaintiff, neither while on the witness stand nor when giving testi-

mony before the grand jury, testified as to the value of the physical property owned by the corporation. His testimony before the grand jury tended to show that Crabtree was perpetrating a fraud upon the company and upon investors, but if the stock had a market value at the time it was converted by defendant company this fraud should not defeat the plaintiff. It is true that plaintiff testified upon the main trial that he had no knowledge in October, 1903, of the value of the company's property, and, before the grand jury, that he examined the property in March of the year 1904; but there is no contradiction here, and nothing which negatives plaintiff's testimony to the effect that the stock was worth in the market fifty cents on the dollar in October of 1903. In the testimony before the grand jury plaintiff did not testify either as to the value of the stock or of the property. Moreover, defendant on the original trial went into this matter of the value of the physical property belonging to the corporation, and did not see fit to cross-examine the plaintiff with reference thereto. The real question on the original trial, relating to this matter, was the value of the stock when converted, and there is nothing in the testimony before the grand jury which would be at all controlling upon this matter, or which if admissible at all would have led to a different result. The trial court did not abuse its discretion in denying the petition for a new trial.

It follows that the judgment on each appeal must be, and it is, *affirmed*.

BESSIE HANCOCK v. JOHN N. HANCOCK, Appellant.

Temporary alimony: APPEAL. An order for temporary alimony
1 less in amount than \$100 will not preclude an appeal therefrom where from the pleadings it is apparent that there is more than \$100 involved in the controversy.

Separate maintenance: DENIAL OF RIGHT TO DEFEND. The allowance
2 of temporary alimony simply upon the allegations of the petition for separate maintenance will not justify an order denying the defendant's right to defend the action prior to payment thereof; it must be made to appear that he is in contempt for failure to comply with the order for payment of alimony.

Appeal from Allamakee District Court.—HON. L. E. FELLOWS, Judge.

TUESDAY, DECEMBER 11, 1906.

REHEARING DENIED, MONDAY, MAY 20, 1907.

SUIT in equity for separate maintenance. An application for temporary alimony and suit money was filed before the defendant answered and the court allowed the same in the sum of \$75, and ordered that the same be paid within a certain time, and that such payment be a condition precedent to any defense in the case. The defendant appeals from the order as an entirety. *Affirmed* in part, and *reversed* in part.

William S. Hart, for appellant.

E. R. Otis and *D. J. Murphy*, for appellee.

SHERWIN, J.—The petition was filed December, 1902, alleging the marriage of the parties in April of the same year, and that the defendant deserted plaintiff immediately thereafter without reasonable or just cause therefor, and that ever since said desertion he has wholly neglected and refused to support the plaintiff or contribute anything thereto. The petition further alleges that the plaintiff has no means of supporting herself and child except by her personal earnings and that her health is such that she is not able to work, and that the defendant has property subject to execution. In September, 1903, and again in September, 1904, the plaintiff filed amendments to her petition; in the latter alleg-

ing that the defendant was the owner of personal property of the value of more than \$500, and of an interest in real estate situated in Allamakee county. Following this last amendment an application for temporary alimony and suit money was made, repeating in substance the allegations of the petition and amendments thereto relating to the defendant's property. In December, 1904, the defendant answered, admitting the marriage and one or two other formal parts of the petition, but denying all of the other allegations of the petition and amendments thereto. In April, 1905, the court entered the order appealed from.

The appellee makes the point that this court cannot review the order of the trial court granting temporary alimony for the reason that the amount ordered paid is less than

1. TEMPORARY ALIMONY: appeal.	\$100 and there is no certificate of the trial judge as required by section 4110 of the Code.
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There is no merit in the appellee's position. The amount allowed, or the amount of the judgment does not necessarily determine the amount in controversy. The statute provides "that no appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed \$100." We have held under this statute that the amount in controversy is to be determined from the pleadings and not from the judgment. *Fullerton v. Railway Co.*, 101 Iowa, 156; *Bank v. Bourdelais*, 109 Iowa, 497. When the amount in controversy appears by the pleadings to exceed \$100, an appeal may be taken to this court without a certificate of the trial judge. *Ormsby v. Nolan*, 69 Iowa, 130. The petition and the amendments thereto clearly show that the plaintiff claims of the defendant an amount largely in excess of \$100, and it is clear that we have jurisdiction of the case on appeal.

No showing other than that made by the petition and its amendments, and by the application for temporary alimony was made with reference to the defendant's property or the condition thereof. It is manifest, therefore, that the

court erroneously ordered that the defendant should not be permitted to interpose his defense to the action except upon payment of the amount allowed as alimony. The question presented by this record on this branch of the case is not a new one in this State. In *Peel v. Peel*, 50 Iowa, 524, the precise question was considered and determined adversely to the appellee's contention. The only possible distinction that can be made between the *Peel* case and this one lies in the fact that in the former the action was for a divorce and alimony, while in the instant case the suit is for separate maintenance and alimony. There is in fact no difference in the principle governing the two cases. Separate maintenance is allowed only upon a showing which would authorize the court to grant an absolute divorce. If any distinction were possible, it would necessarily operate against the contention of the appellee, because in this suit the ground on which separate maintenance is predicated is desertion, and hence the only real question entering into the judgment is a question of the defendant's liability for, and ability to furnish, such support. In the *Peel* case, *supra*, the wife was the plaintiff, and the order was made requiring the husband to pay her temporary alimony. The order was not complied with, and, thereafter, the defendant's answer was stricken because thereof. We held the order erroneous, and said: "It does not follow, as a matter of course, that a defendant is guilty of an intentional contempt of the court's authority by failure to pay the money as required by the order of the court. Misfortune, mistake, inability arising from disease of mind or body or from poverty, if shown as a reason of nonsupport, would surely have purged the defendant from contempt." We further held in the same case that, if the defendant was not in contempt under the circumstances there shown, there was no ground upon which a justification of the order to strike could be based. In other words, in cases of this kind, a party can only be denied the right to prosecute his action

2. SEPARATE
MAINTENANCE:
denial of right
to defend.

if the plaintiff, or to defend if the action be brought against him, where it appears to the court that he is in contempt for not complying with an order for alimony. Following the *Peel* case, we held in *Baily v. Baily*, 69 Iowa, 77, that the enforcement of a decree for alimony depends to some extent upon the statute and said: "It is provided by the statute that judgments or orders requiring the payment of money or the delivery of the possession of property are to be enforced by execution. Obedience to those requiring the performance of any other act is to be coerced by attachment for contempt." And we held that the defendant could not be deprived of his right to defend the action because of his failure to comply with the order for alimony. The same rule was followed in *Allen v. Allen*, 72 Iowa, 502.

It is said by the appellee, however, that the courts have the inherent right to punish a failure to comply with an order for alimony whenever it shall appear that the party so ordered is contumacious. It is undoubtedly true that such has been the holding in some jurisdictions; but that question is not now before us for consideration, for here the order granting the alimony was coupled with the condition of which complaint is made, and there was absolutely no showing that the plaintiff could not or would not comply therewith; hence it cannot be said that the defendant was contumacious or in contempt.

The appellant contends that the order for alimony should not have been made because of the insufficiency of the showing therefor. It may be conceded that the showing is not a strong one, and yet we think there is sufficient in the pleadings and in the application for alimony to warrant the allowance, notwithstanding the denial of the defendant's answer. As we understand the record, no specific objection was made to the application.

The order allowing alimony in the sum of \$75 will stand affirmed. In all other respects, it is reversed, and the case is remanded for proceedings not inconsistent with this opinion.— *Affirmed* in part and *reserved* in part.

MARY BOLTZ, Appellant, v. NICHOLAS COLSCH, Appellee.

Actions: AMENDMENT: EQUITY TRIAL. A law action, which, by
1 amendment is converted into one to quiet title, even after a
jury has been impaneled, should be transferred to the equity
side of the docket and tried to the court.

Boundaries: ACQUIESCENCE: EVIDENCE. Where a division fence as
2 originally built was not intended as marking the true bound-
ary line, nor so treated by the parties thereafter, the doctrine
of acquiescence does not apply.

Evidence held insufficient to show acquiescence.

Adverse possession: EVIDENCE. To create a title by adverse pos-
3 session there must have been an uninterrupted, exclusively hos-
tile possession, with intent to claim up to a certain line, no
matter where the true line may be.

Appeal from Allamakee District Court.—HON. L. E. FEL-
OWS, Judge.

FRIDAY, DECEMBER 14, 1906.

REHEARING DENIED, MONDAY, MAY 20, 1907.

THIS is a controversy over the boundary line between
plaintiff's and defendant's lands. The trial court held with
defendant, and plaintiff appeals.—*Affirmed.*

J. P. Conway, for appellant.

H. E. Taylor and *W. S. Hart*, for appellee.

DEEMER, J.—The action was originally brought to
settle the boundary line between lots 5 and 6 in section 28,
township 100 N., range 4 W., in Allamakee county; plain-
tiff being the owner of lot 5, and defendant of lot 6. There-
after plaintiff filed an amendment converting the action into
one to quiet her title to a strip between the two lots which

is in dispute. Plaintiff claims that a certain line between the two lots has been established by acquiescence and adverse possession, while defendant denies this, and says that the true line is marked by a fence recently erected by him. Lot 5 adjoins lot 6 on the north, and the property in dispute is a tract running east and west between the two lots, sixty-seven links wide at one end and ninety at the other. The testimony satisfactorily shows that the true line is where defendant now claims it to be and where he built a fence in the year 1902. But plaintiff insists that another line south of that has been established by acquiescence and adverse possession, and that no matter where the true line is she is entitled to have the one she claims established and her title down to that quieted, by reason of the facts to which we shall presently refer; relying upon the doctrine announced in *Miller v. Mills County*, 111 Iowa, 654, and other like cases.

I. Before going to the merits we shall settle a matter of practice. After a jury had been impaneled, plaintiff filed the amendment to her petition asking that title be quieted in her. In view of the allegations
1. ACTIONS:
amendment: and prayer of the original petition, it is doubtful if the action was triable to a jury; but
equity trial.
however this may be, an action to quiet title is purely of equitable cognizance. Recognizing this rule, defendant, after the filing of the amendment, moved to transfer the case to the equity calendar for trial to the court. This motion was sustained, and in this there was no error. See Code, section 4227.

II. In the year 1866 plaintiff's father, Nicholas Temple, purchased from one Weymiller the two lots 5 and 6, and at that time there was a rail fence along or near the line which plaintiff now claims is the true one.
2. BOUNDARIES:
acquiescence: This fence is called a "pasture fence,"
evidence.
and was used as such both by Temple and Weymiller. Some time after Temple's purchase, he sold lot 6 to one Jacob Prinz, his stepson, and in 1873 he sold lot 5 to the plaintiff. Jacob Prinz used and

lot 5 to the plaintiff. Jacob Prinz used and occupied lot 6 down to the year 1893 when he sold it with other land to the defendant Colsch. It is claimed that this rail fence was repaired from time to time, increased in height, and was finally, in the year 1875, replaced by a wire fence attached to certain trees and posts upon practically the same line as the old rail fence. Both lots border upon the Iowa river, and both are subject to overflow. Because of this, the fence to which we have already referred was frequently washed away, and in the year 1902, when defendant constructed the fence upon the line where he now claims it to be, the wire fence was nearly all gone. After the floods which washed away the fences occurred, the fence was not always replaced upon the same line. The wires were attached to convenient trees, and the fence was never a straight one, and since defendant's purchase he has generally repaired the fence after its destruction by floods. There is no showing that either Temple or his grantor ever maintained the rail fence as marking the boundary line between lots 5 and 6. After the sales by Temple it may be that his grantees, or some of them, thought the fence was upon the true line, but it appears from the testimony that defendant's grantor Prinz did not regard the old fence as being upon the true line, nor did defendant after his purchase. Plaintiff herself, for the purpose of finding the line after her purchase in order that she might grub down to it, had a party stake it out, and these stakes were set near where the line is as now marked by defendant's fence. She (plaintiff) thereupon grubbed down to the line marked by these stakes, and no farther. In the year 1902 the wire fence was washed out and defendant, wishing to rebuild it upon the true line, proposed to plaintiff that they have the line surveyed. This proposition was accepted, and plaintiff sent for the county surveyor and he, the county surveyor, ran the line establishing it where defendant now contends it should be. This being satisfactory to plaintiff, defendant built his fence upon this line. Thereafter and in March of the year 1904, plaintiff com-

menced this action in which she complained of the fence as a nuisance, and asked that her title to the land between the old and the new fences be established in her.

The testimony as to the location of the old fences is not very satisfactory. They manifestly did not run straight, but varied from one rod to sixty or more feet from the true line, and it is very difficult, if not impossible, now to follow the line of the old fences as claimed by plaintiff. If plaintiff is to recover at all it must be because of acquiescence of the parties in the old fences as being upon the true line, or because of her adverse possession of the strip in dispute. It is manifest that neither defendant nor his grantor recognized the old fence as being on the true line, and it quite satisfactorily appears that plaintiff did not so regard it. She (plaintiff) had stakes set before she did her grubbing, and these were where the line now is as claimed by defendant. In the year 1899 defendant grubbed out the tract in dispute, and hauled away the logs cut therefrom, plaintiff's husband, who acted for her, assisting him in loading some of the logs. Plaintiff agreed to the resurvey made by the county surveyor, and did not object to the fence built by defendant until long after it had been erected. Under these facts there is no room for the doctrine of acquiescence. There is no showing that the fence as originally built was intended as a boundary one, and the parties now in interest have never so treated it. The case in this respect is ruled by *Kitchen v. Chantland*, 130 Iowa, 618; *Palmer v. Osborne*, 115 Iowa, 715, and other like cases. See, also, *Kellogg v. Smith*, 7 Cush. (Mass.) 375, for a valuable discussion of this matter.

III. The doctrine of adverse possession as distinguished from acquiescence does not apply for several reasons. (1) Plaintiff has not been in the exclusive hostile possession of the strip in dispute. She has recognized by her acts and conduct that the old fence did not mark the true line. (2) She does not

8. ADVERSE POSSESSION: evidence.

show an intent to claim to the old fence no matter where the true line may be. (3) Her possession, such as she has had, has been interrupted and was so far as this record shows nothing more than permissive. The rule of *Grube v. Wells*, 34 Iowa, 148, in so far as it applies strictly to the doctrine of adverse possession has never been departed from. Nor should it be, for it is essential to adverse possession that there be an occupancy with intent to hold in hostility to the true owner. The intent or *quo animo* of the possessor must be shown. See, as sustaining these conclusions, *Erikson v. Slate*, 130 Iowa, 187; *Lawrence v. Washburn*, 119 Iowa, 109; *Klinkner v. Schmidt*, 114 Iowa, 695.

The decree seems to be correct, and it is *affirmed*.

W. A. HOUTS, Appellee, v. SIOUX CITY BRASS WORKS ET AL., Appellant.

Corporations: NOTES: EXECUTION. The renewal note of a corporation is not rendered invalid because executed by an officer who has been superceded, where the signature of such official is not essential thereto.

Corporate debts: LIABILITY OF STOCKHOLDERS: ACTION AGAINST.
2 Failure to publish notice of incorporation renders the stockholders liable for corporate debts, and it is no objection to a suit against them as such that they are designated in the petition as co-partners.

Same. The question of whether one who buys stock in a defectively organized corporation is liable for the debts of the corporation contracted prior to his purchase, has not been determined in this State, and owing to the state of the record is not determined in this action.

Parol evidence: VARIANCE OF WRITING. Parol evidence is not admissible to vary the terms of a written instrument.

Same. Where it was alleged in an action on a corporation note that the payee should turn the note in as payment on a contract of the corporation to furnish him certain articles, such agreement if proven will not destroy the enforceability of the

note upon failure of the corporation to perform, but at the most will only form the basis of a claim for damages.

Appeal: REVIEW OF QUESTIONS NOT RAISED BELOW. A matter which 6 is not presented to the trial court will not be reviewed on appeal, and when justice to the trial court demands the appellate court will on its own motion enforce the rule.

Receivers: RIGHT OF DEBTOR TO ASSETS. Where the business of 7 a concern has passed into the hands of a receiver, under an order of court broad enough to cover a claim for damages, the debtor cannot sue to recover the same prior to a discharge of the receiver, or satisfaction of creditors, although the same may not have been listed among the assets.

Appeal from Woodbury District Court.—HON. JOHN F. OLIVER, Judge.

WEDNESDAY, JANUARY 9, 1907.

REHEARING DENIED, MONDAY, MAY 20, 1907.

THE facts are sufficiently stated in the opinion. At the close of the evidence, there was judgment in favor of plaintiff on a directed verdict, and the defendants appeal.—*Affirmed.*

R. H. Brown, for appellants.

Pendleton & Wakefield and *J. W. Hubbard*, for appellee.

BISHOP, J.—Considerable confusion exists in the record, and we have had not a little difficulty in getting at a fair understanding of the questions sought to be raised on the appeal. As originally brought the suit was to recover upon two promissory notes each dated February 8, 1897, aggregating \$700. executed in the name of the defendant Brass Works to plaintiff as payee, and in each the time of maturity was fixed at four months after date. Recovery was sought, not only as against the Brass Works, but as against the individuals made defendants, viz.: F. T. Green, J. H. Green,

H. O. Woodruff, and L. G. Wilson. The averment for liability on the part of the individuals named is that the Brass Works, while "presumably incorporated under the laws of Iowa, was at all times a voluntary association and is in fact a copartnership . . . composed of the defendants above named," and this for the reason that no notice of incorporation was never published as required by law. Subsequently plaintiff by amendment added an additional count to his petition. Therein it was alleged that on May 9, 1896, a contract in writing was entered into between himself and the Brass Works, the substance of which was that the latter was to construct for him (plaintiff) 1,000 automatic telephone switches, for which plaintiff was to pay \$5,000. "as the work progresses." No time within which the work should be done was specified. A further allegation is that on April 22, 1897, the contract was extended by writing to include 1,000 telephone dials, for which plaintiff was to pay an additional sum of \$1,000. and on the conditions specified in the original contract. Advancement under the contract of the sum of \$4,265. exclusive of the amount of the notes set out in the first count, is alleged, and plaintiff says that he has received only one hundred dials and switches of the value of \$600. And the complaint is that defendants refuse to complete and make delivery of the remaining instruments so contracted for. The same averments as to liability on the part of the individual defendants is made as in the first count. Judgment on this count was demanded in the sum of \$3,655. The defendants, except Wilson, appeared, and, pleading to the first count of the petition, they deny all allegations not thereafter admitted; deny on information the execution of the two notes alleged; allege that such notes, if executed, were without authority, and, as against the defendants Green, fraudulent. By way of further defense, defendants plead the written contract, the substance of which is set out in the count 2 of the petition; and they then plead "that it was also agreed between the parties that the two

notes sued upon should be considered as a last payment upon said contract, and should not become due and payable until said contract was completed . . . nor unless plaintiff had complied with his contract to furnish the money necessary for the labor and material for the construction of the dials and switches." Further, that by the agreement the money represented by said notes was to be and was expended in the purchase of special machinery for the manufacture of the contemplated dials and switches, and that the notes were to be paid "in the labor for constructing said dials and switches"; that "up to April 24, 1897, the plaintiff had paid on said contract \$4,050. and thereafter failed and refused to provide more money to defendant to complete said dials and switches although often requested," etc. No answer to the second count of the petition was made, as the same had been withdrawn. In what is denominated a counterclaim and set-off defendants allege that the notes sued on by plaintiff are not due or a binding obligation because of the failure of plaintiff to comply with his agreement as alleged in the answer. And they allege that, by reason of such failure, they have been damaged in the sum of \$1,950. being the difference between the amount paid in by plaintiff and the contract price. And judgment for that sum is asked. Plaintiff replied, denying the alleged oral portion of the agreement set up in the answer; denying failure on his part to perform; and denying ownership on the part of defendants in the matter of damage alleged in the counterclaim.

I. Having the contentions of the parties as made in pleading before us, we may proceed to a consideration thereof, and in the light of the facts as brought out in evidence. Quite naturally the first question is, ^{notes:} ^{execution.} 1. CORPORATIONS: were the notes sued upon the authorized obligations of the Brass Works? The notes are executed in the name of the Brass Works, "by L. G. Wilson, Pres., H. O. Woodruff, Secy." The sole contention for invalidity is that

Woodruff was not secretary; that he had been succeeded in that office on February 5th, preceding, by F. T. Green. Whether plaintiff was chargeable with notice of the change in officers, or could be affected thereby, we need not inquire, as it does not appear that the signature of the secretary was necessary to give validity to the notes. An estoppel is not pleaded, but we add the suggestion that defendants ought not in any event to challenge the binding character of the notes, in view of the fact conceded in the evidence that such notes were given in renewal of past due obligations, confessedly valid, held by plaintiff against the defendant works, and it is not pretended that there has been any offer to restore the *status quo*. 10 Cyc. 1068.

II. Were the individual defendants named liable for the debt evidenced by the notes sued on in their individual capacity? It was fairly proven that no publication of notice

2. CORPORATE
DEBTS: liability
of stockhold-
ers: action
against

of the formation of the corporation was ever had within the time and as required by law.

This was sufficient to fasten liability for corporate debts on the stockholders. Code, sections 1613, 1614, 1616; *Berkson v. Anderson*, 115 Iowa, 674; *Maine v. Midland Inv. Co.*, 132 Iowa, 272.

It is argued by counsel for appellant, however, that plaintiff was not entitled to recover as against the individual defendants, because their liability, if such there was, arose out of the statute, whereas they were declared against as copartners and were so found to be by the court. The argument is devoid of any merit. It is not of any moment that the defendants were designated in the petition as copartners. It is evident that they were being proceeded against as stockholders, and liability was charged against them because of the defective organization of the corporation, and in virtue of the statute. This was the view taken by the trial court in ruling upon the motion and entering judgment.

Further, it is said in argument that the motion for verdict should not have been sustained as to the defendants

Green for the reason that they did not become stockholders in the corporation until after the indebtedness

8. SAME.

to plaintiff had been incurred. Whether one who buys stock in a defectively organized corporation incurs liability, in virtue of the statute provision, for debts of the corporation contracted prior to the date of his stock purchase is an open question in this State. And it is a question of importance — one that we should not attempt to decide until properly presented and fairly argued. In their answer defendants present no such question. All that is said as to these particular defendants is that the notes were fraudulent. And that expression is not given any meaning in the evidence. Nor is it certain from the record what are the facts. To one interrogatory attached to the petition the defendant J. H. Green answered that his connection with the corporation commenced February 29, 1897, and to another he answered that his stock was issued to him about February 5, 1897. The defendant F. T. Green answered the first by saying that his connection began December 30, 1897, and to the second that his stock was issued on or about that date. The defendant last named was a witness on the trial, and testified that he became connected with and took stock in the corporation on February 5, 1897; that on that day he was elected secretary and entered upon his duties. It will be observed that the notes sued upon were executed February 8, 1897. It is said that they were renewal notes, but what they were given to renew, or when the old obligation was incurred, does not appear. To some extent there is argument on the question by counsel for appellant, while counsel for appellee have contented themselves with citing some authorities which as we think do not reach the point. In this state of the record we do not feel called upon to make any pronouncement on the subject.

III. It will be observed that, in the defensive part of their answer, defendants contend that, by oral agreement of the parties, the notes in suit were not to be paid in money;

that such notes were to be available to plaintiff only in making final payment on the contract for telephone appliances. Going to the record of the trial, we find that the evidence on the subject is confined to the testimony of one witness — the defendant Woodruff — and as it is brief we set it out in full: “I first met plaintiff in 1895. The first agreement with him was oral and afterwards reduced to writing. The oral agreement was that the Brass Works should make 1,000 phones for \$6,000. Of that amount plaintiff was to advance money to get equipped for making them. . . . He advanced \$700. We gave him notes for it. The notes were to be turned in as a last payment on contract, and while we were making the switches he was to pay for material and work as it progressed.” The date of this oral agreement does not appear. We take it that the witness meant to be understood that the \$700. was advanced, and the notes given, under the oral agreement. Indeed, when we come to inspect the written agreement that followed, this would seem to be made certain. As we have seen, such written agreement was entered into May 9, 1896. Therein 1,000 switches were contracted for and the consideration expressed was \$5,000. to be paid “as the work progresses.” But there is no reference to an advancement of money or to any notes. At the close of defendant’s evidence, plaintiff moved to strike out so much of the testimony of Woodruff as had relation to the oral agreement on the ground that the subsequent writings became conclusive as to the contract rights of the parties, and this motion was sustained. It is insisted that here was error, and, further, that with the evidence remaining in the record the motion to instruct a verdict must have been overruled. We think there was no error.

If there could be doubt — and we think there is none — as to the correctness of the ruling put upon the ground that evidence of a previous oral agreement was not competent to add to or vary the terms of the writings (*De Long v.*

4. PAROL
EVIDENCE:
variance
of writing.

Lee, 73 Iowa, 54; *Kelly v. Railway*, 93 Iowa, 445), still,

5. SAME.

there are other sufficient reasons upon which the ruling can be sustained. It was conceded on the trial that the contract had been abandoned before completion. Fire had destroyed the plant of the Brass Works — in part, at least; it had become insolvent, and its business closed out at the hands of a receiver. If, now, defendants were permitted to stand in a defensive way upon the alleged oral agreement, the effect would be to wholly destroy the enforceability of the notes as binding obligations. And this without any reference to the situation of the parties as of the time when work under the contract ceased, or to any matter of injury or damage consequent thereon. No court would countenance such a result. There had been no failure of consideration of the notes; the Brass Works received the advancement of money, and became the owner of the machinery purchased with such money. The oral agreement alleged had relation only to the time and manner of repayment. If then, an agreement so made could be proven at all, in view of the situation in which the parties ultimately found themselves, it should be given effect, not to destroy the enforceability of the notes representing the advancement, but, at best, as a basis on which to rest a claim for damages. Now, here no claim for damages is presented on account of any such matter; the demand of the counterclaim is for a sum representing the difference between the money received from plaintiff — exclusive of the amount of the advancement — and the contract price. A further reason is that, upon the face of the record, it is not clear that the notes in suit in any way represent the sum of money advanced. True, the aggregate amount of the notes is the same as the amount of the advancement, but they are dated long after the contract had been entered upon, and there is nothing in evidence to show their origin save that they were given "to take up binding ones regularly issued."

IV. It is a further contention of appellant that the

motion for verdict should have been overruled and a recovery by plaintiff denied, for that, according to the evidence, there was due from plaintiff under the contract a sum quite equal to the amount of the notes; that is to say, labor and material had been expended by the Brass Works in the manufacture of the switches, etc., for which plaintiff was obligated under the contract to pay, exceeding in amount and value the gross sum paid by plaintiff, and such excess being sufficient to pay and cancel the notes in suit. Here, also, is matter presented in this court for the first time. Plaintiff was not called upon to meet any such issue on the trial, and the trial court did not attempt a determination of any such matter. Accordingly we have no question before us for review. And this we think should be said irrespective of the fact that the point is not raised in argument by appellee. We will take note of the record and enforce the rule on our own motion where justice to the trial court demands it.

V. Error on the part of the trial court in permitting a "dismissal of plaintiff's counterclaim against the objections of defendant" is contended for. We are at a loss to know what is meant by this. If the dismissal by plaintiff of the second count of his petition is the matter referred to, there was no error. Such is directly authorized by Code, section 3764. Code, section 3766, cited by counsel, will be found on second reading to have application only to the right of a defendant to proceed on a counterclaim notwithstanding the dismissal by plaintiff of his cause of action.

VI. Lastly, it is insisted that the motion to direct a verdict should not have been sustained as to the counterclaim for damages pleaded by defendants. In October, 1898, the business of the Brass Works went into the hands of a receiver, and the receivership seems to have been general. Indeed, it is not questioned but that the order of appointment was broad enough to cover the claim of damage in question. The claim, however, was not

6. APPEAL:
review of
questions not
raised below.

7. RECEIVERS:
right of debtor
to assets.

listed by the receiver. Subsequently an order of court was made in the receivership proceedings, directing the receiver to make sale of all the assets of the corporation, and in due time a report was made showing a sale of such assets as a whole to the Hawkeye Electric Company. These facts being made to appear on the trial of the instant case, the court, in ruling on the motion for verdict, expressed the opinion, as shown by the record, that the defendants could not sue; that the claim for damages had passed to the Hawkeye Company. The contention of appellants is that in this the trial court was in error. And the argument is that, inasmuch as the claim had not been listed by the receiver, it cannot be held to have entered into the sale; it was not within the contemplation of the receiver in making the sale, or of the Hawkeye Company in making its purchase. But, even if this were so, in view of the record before us, we cannot see how defendants are helped any. If the right of action was not transferred to the Hawkeye Company, it must remain in the receiver. And, as it does not appear from the record before us that the receiver had been discharged, or that the creditors of the corporation have all been satisfied, it would seem to be certain that defendants are not entitled to wage suit to reduce the claim to their possession. There was, then, no prejudicial error.

Upon the whole record, we are satisfied that the judgment should be, and it is, *affirmed*.

THE STATE OF IOWA, Appellee, v. J. M. HANLIN, Appellant.

Indictment: MOTION TO RE-SUBMIT: RESISTANCE: ESTOPPEL. A defendant, who, before trial successfully resists a motion by the State to set aside the indictment and re-submit the cause to the grand jury, because of alleged defects therein, cannot upon conviction rely on a denial of the motion as ground for reversal.

Public officers: FALSIFICATION OF ACCOUNTS: EVIDENCE: INSTRUCTION. Proof of a corrupt purpose or motive is not necessary to support an indictment charging a public officer with falsifying the books of account of his office; that it was wilfully or intentionally done is sufficient; and an instruction that defendant could not be held liable for mere discrepancies arising from oversight, forgetfulness or incompetency, but that if they were knowingly and intentionally made he would be liable, was as favorable as he could rightfully expect.

Same. The fact that accounts are entered in a book not required by law to be kept is not a defense to a prosecution for falsifying the accounts of a public office; if the same are kept in some book in the office from which settlement is to be made with the parties to whom the funds belong it is sufficient.

Same: LIABILITY OF DEPUTY CLERK. A deputy clerk of the court may be convicted of falsifying the accounts of a public office under Code, section 4910, irrespective of whether he is an officer within the legal definition of the term, as the statute is not restricted to public officers.

Appeal from Lucas District Court.—HON. ROBERT SLOAN, Judge.

WEDNESDAY, JANUARY 9, 1907.

REHEARING DENIED, MONDAY, MAY 20, 1907.

THE opinion states the case.—*Affirmed.*

Penick & Anderson and *O. A. & L. B. Bartholomew*, for appellant.

Chas. W. Mullan, Attorney General, and *L. De Graff*, Assistant Attorney General, for the State.

WEAVER, J.—From January 1, 1901, to January 1, 1905, one E. S. Wells was the duly qualified and acting clerk of the district court of Lucas county, Iowa. During the same period the defendant herein served continuously as Mr. Wells' deputy in said position, and as such received and paid out a large proportion of the moneys of said of-

file, and had principal charge of its books of account. At the close of his term of service there were found, or claimed to be found, some discrepancies in the books or confusion in the accounts, indicating that numerous items of fees and fines received by the office and payable to Lucas county had not been properly credited to its account. Growing out of this alleged condition of affairs the defendant was indicted upon the charge of falsifying the accounts of the office. Before the cause came on for trial the county attorney, becoming convinced that the indictment was defective in failing to particularly state the specific acts of falsification charged against the defendant, moved the court on that ground to set aside the indictment and resubmit the matter to the grand jury. This motion was resisted by counsel for defense, and overruled. The defendant pleaded not guilty to the charge as made, but on trial to a jury he was convicted, and from a judgment requiring him to pay a fine of \$100 and costs of prosecution he appeals to this court.

It is argued that the indictment fails to charge any specific act of wrongdoing, and is therefore insufficient to warrant or uphold a conviction. We are of the opinion that

1. INDICTMENT: the indictment was defective, and if the ap-
motion to pellant was in a position to take advantage of
resubmit: the defect we should have no hesitation in re-
resistance: versing the judgment against him. But, as we have al-
estoppel. ready noted, when the insufficiency of the formal charge
was discovered, and it was sought to send the case back to
the grand jury in order that the matter in controversy might
be heard and disposed of upon its merits, the defendant
by his counsel resisted the application and secured a ruling
that the trial proceed upon the indictment as it stood. The
same counsel now repudiate the ruling which they induced
the court to make, and in support of the appeal insist that
said application "should have been sustained by the court
upon its own motion." It would seem unnecessary to say
that a party cannot thus play fast and loose with the law

or with the court. An accused person is not always under obligation to point out fatal defects in the indictment against him, but may remain silent, and, if an adverse verdict is obtained, raise the question in arrest of judgment. If, however, before entering upon the trial, the State discovers the defect and moves a resubmission for its correction and the defendant successfully resists the motion, his mouth is forever closed to insist that the court should not have taken him at his word. See cases cited in volume 2, Cyclopaedia Pleading & Practice, 516, 517. That it is competent for the trial court to order the resubmission of a criminal charge to the grand jury where the indictment is clearly defective, see *State v. Kimble*, 104 Iowa, 19.

II. Exception is taken to the sufficiency of the evidence to support a verdict of guilty. While the case as here presented is such that some members of the court would be better satisfied with a contrary result, yet there is evidence fairly tending to establish the claims of the prosecution, and, as the verdict of the jury has passed the scrutiny of the trial court, we do not feel at liberty to set it aside. It is made quite clear that in substantially all of the matters brought in question by the charge against the appellant he made proper entry in the judgment, or combination docket kept in the clerk's office, of the moneys collected and received by him in his official capacity. It appears, however, that the clerk or the appellant provided and made use of two other books, known as the "cash book" and "distribution book," into which the cash items were gathered or transferred from the dockets, and such portions of said items as indicated collections received which were payable to the county were segregated and entered in a separate column. When settlements were made between the clerk and the county, resort was had to these last mentioned books, instead of tracing the several items through the dockets, and the clerk from time to time paid over to the county treasurer the balances thus

2. PUBLIC
OFFICERS:
falsification
of accounts:
evidence:
instruction.

shown in his hands. It appears, however, that the transfer of the entries from the dockets to the cash book and distribution book was imperfectly done; some of the items being entirely omitted, and in some other instances the amounts entered in the cash book or distribution book were less than the amounts shown by the dockets from which they were taken. These items were mostly of somewhat trivial character, ranging from twenty-five cents to \$15, but the aggregate at the close of appellant's term of service was a matter of several hundred dollars.

Appellant is not charged with the embezzlement of any of these funds, nor is it urged in argument on part of the State that he in any manner profited by his alleged falsification of the books. Nor is proof of such fraudulent act or purpose essential to the State's case. The charge against the appellant is laid under Code, section 4910, which makes the falsification of the books or accounts of the clerk's office a misdemeanor. The act is forbidden without reference to the motive which prompts it, and if it be done willfully or intentionally, and that fact be sufficiently shown by the evidence, a conviction will be upheld, even though there be an entire failure of proof showing corrupt purpose or motive on part of the accused. Indeed, if fraudulent purpose be found to accompany the act forbidden by Code, section 4910, it will constitute the much greater offense of forgery under the provisions of section 4853. The fact that the latter offense is classed as a forgery and punished as a felony, while the former is classed as a misdemeanor only, would seem to indicate that the primary purpose of the prohibition and penalty prescribed by section 4910 is to insure scrupulous care and attention in making and keeping the books of the office, rather than to punish fraud and corruption in the discharge of such duty.

The trial court instructed the jury that mere mistakes, discrepancies arising from mere oversight, forgetfulness, or incompetence in keeping the accounts of the office, would

not justify a conviction, and that defendant could be held liable in this proceeding for only such discrepancies and incorrect entries, if any, as were knowingly and intentionally made by him. This interpretation of the statute was as favorable to the appellant as he could rightfully expect. The verdict of the jury is therefore equivalent to a special finding that at least some of the omissions or incorrect entries made by him in the clerk's books of account were not the product of mere mistake or inadvertence on his part.

Neither are we prepared to say that the fact that the books in the keeping of which these discrepancies appear were not books specifically prescribed by the statute to be

kept in the office will serve to prevent the application of the statute to punish their falsification. If the clerk supplements the books which the statute expressly requires him to keep by other books in which for the convenience of the office or persons having dealings therewith the accounts of the business of such office are kept, or to which such accounts are transferred, such books are to be considered as being within the protection of the statute now under consideration, and not as mere private memoranda, having no relation to the public records. That statute (Code, section 4910) not only prescribes a penalty for falsifying a court "docket," but also for falsifying the "accounts" of the office for fees and fines collected, without any reference to the book or books in which such accounts may be kept. If such account be kept in the office in some book from which settlement is made with the parties to whom the fees and fines are payable, the account thus kept comes fairly within the meaning of that word as used in the statute. Irrespective of express statutory direction or designation, it has often been held that books actually kept in a public office and containing an account of the transactions and business thereof are public records. *Coleman v. Commonwealth*, 25 Grat. (Va.) 865 (18 Am. Rep. 711). This rule has been applied to a day book kept by a clerk of court,

Daly v. Webster, 1 U. S. App. 573 (56 Fed. 483, 4 C. C. A. 10; also to the accounts of selectmen, *Thornton v. Camp-ton*, 18 N. H. 20; to the bank pass book of a state treasurer, *Commonwealth v. Tate*, 89 Ky. 587 (13 S. W. 113); to books of account of a house of correction, *People v. Kemp*, 76 Mich. 410 (43 N. W. 439); and books of a county clerk showing his account with the treasurer, *Rizer v. Cal-len*, 27 Kan. 339.

Even where no express statutory requirement exists, it is still essential to the proper discharge of an official trust, that the incumbent of an office make and preserve a record of the business so intrusted to him, including a fair and full account of his receipts and expenditures in his official capacity, and when so kept the account is a record of his office, which he cannot knowingly and intentionally falsify without violation of law. The rule has been well stated by the Virginia court that, whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty, to keep that memorial, whether expressly required to do so or not, and when kept it becomes a public document, a public record belonging to the office, and not to the officer, is the property of the State, and not of the citizen, and is in no sense a mere private memorandum. *Coleman v. Commonwealth, supra*. There are not wanting cases which seem to uphold the contrary view, see *Carrington v. Potter* [C. C.], 37 Fed. 767; *Noble v. Douglass*, 56 Kan. 92 (42 Pac. 328); *Downing v. Brown*, 3 Colo. 571; but the doctrine here approved is both reasonable and just, and cannot be departed from with safety to public interests.

We think there is no merit in counsel's contention that Code, section 4910, has no application to a deputy clerk.

4. SAME:
liability of
deputy clerks. The statutory prohibition is not restricted to public officers. It provides a penalty for the falsification of the records and accounts of an office, by whom-

soever the wrongful act is done, whether it be the officer himself, his deputy, or other person. In view of the comprehensive terms of the statute, it is unnecessary for us to consider whether counsel is correct in their claim that a deputy clerk is not an officer within the legal definition of that term. Without further discussion, we have to say that after reading the record of this case with much care we find no good ground for disturbing the verdict and judgment. It is not disputed that defendant had a large share in the making and keeping of the accounts of the office, and that in the entries made by him there were a large number of errors, the effect of which, if not corrected, was to deprive the county of a very considerable sum of money. As a witness, he concedes many of these discrepancies and makes no explanation thereof, save to say that they are the result of honest mistakes, and not of design on his part. All this may be true, but that was a question on which the State was entitled to have the finding of the jury. It was submitted under proper instructions and the finding was adverse to the appellant. There is evidence from which fair-minded men could reach that conclusion, and we have no authority to interfere. Some other questions have been argued by counsel, but so far as they properly arise upon the record they are controlled by the conclusions already announced.

We find no reversible error, and the judgment of the district court is *affirmed*.

JAMES McBRIDE, Appellant, v. THE CITY COUNCIL OF INDEPENDENCE, IOWA, A. T. O'BRIEN, P. MCCORSTIN, J. L. MABIE, M. A. DOUGHERTY, JOHN WEBER, M. R. BRIERLY, W. S. WALLACE, JOHN LEKEL, F. A. SAWYER, JARVE MARQUETTE, as members of said City Council of Independence, Iowa, and J. R. MONTGOMERY, defendants.

Appointment to office: SOLDIERS PREFERENCE. An honorably discharged soldier or sailor is not entitled to a preference, in the matter of appointment to office, unless his qualifications are equal to those of his competitors.

Appeal from Buchanan District Court.—HON. A. S. BLAIR,
Judge.

FRIDAY, JANUARY 11, 1907.

REHEARING DENIED, MONDAY, MAY 20, 1907.

ACTION in mandamus to compel the defendants to appoint plaintiff city collector of the city of Independence. The petition was dismissed, and plaintiff appeals.—*Affirmed.*

Cook & Cook, for appellant.

H. C. Chappell, for appellees.

LADD, J.—The plaintiff, though an honorably discharged soldier of the late Civil War, of good moral character and competent to perform the duties of the position, was refused the office of the city collector of the city of Independence for which he had made timely application in due form, and T. R. Montgomery, who was not a veteran of that war, was appointed in his stead. The petition, praying for a writ

of mandamus, so stated, but omitted to allege that the men were possessed of equal qualifications, and on this ground, as well as that the act of the Legislature was unconstitutional, the demurrer to it was sustained. Since the ruling was made the constitutionality of the act has been upheld by this court, *Shaw v. City Council of Marshalltown*, 131 Iowa, 128, and that question is not argued. Our inquiry then is limited to whether, in order to be entitled to preference, the veteran of the Civil War must have qualifications equal to those of his competitors for the place sought. This necessarily depends upon the interpretation to be given the statute creating preference.

Section 1, chapter 9, Acts 30th General Assembly, provides:

That in every public department and upon all public works in the State of Iowa, and of the counties, cities and towns thereof, honorably discharged soldiers, sailors and marines from the army and navy of the United States in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment, employment and promotion over other persons of equal qualifications and the person thus preferred shall not be disqualified from holding any position hereinbefore mentioned on account of his age or by reason of any physical disability, provided such age or disability, does not render him incompetent to perform properly the duties of the position applied for, and when such soldier, sailor or marine shall apply for appointment or employment under this act, the officer, board or person whose duty it is or may be to appoint or employ some person to fill such position or place, shall before appointment or employing any one to fill such position or place make an investigation as to the qualifications of said soldier, sailor or marine for such place or position, and if he is a man of good moral character and can perform the duties of said position so applied for by him, as hereinbefore provided, said officer, board or person shall appoint said soldier, sailor or marine to such position, place or employment. A refusal to allow the preference provided for in this and the next succeeding section to any honorably discharged soldier,

or a reduction of his compensation intended to bring about his resignation or discharge entitles such honorably discharged soldier, sailor or marine to a right of action therefor in any court of competent jurisdiction for damages, and also a remedy for mandamus for righting the wrong.

Analyzing this statute somewhat, it will be seen that the first part of the section relates to the persons entitled to the preference and the last portion to the manner of securing such preference. It is created in favor of veterans of the Civil War, but over those only of equal qualifications. As the veterans are advanced in years, it is further provided that neither age nor physical infirmity shall be considered in passing on their qualifications for the position, unless these are such as to render them incompetent to perform the duties of the position sought. This does not deny to the public the benefit of superior service nor the advantage of having the best qualified men in the service of the public; for the veteran's qualifications to discharge the particular duties exacted must at least equal those of his competitors to entitle him to preference.

The last portion of the section relates solely to effectuating the preference created by the first part. It concerns those only for whose benefit the statute was enacted, for it begins: "When such soldier, sailor or marine shall apply," etc. Manifestly this refers to the soldier, sailor, or marine previously described, and before making the appointment the board or officer required to select is bound to make an investigation as to the applicant's qualifications. If these are not equal to those of the other persons under consideration, he is not of the class of persons previously defined and in whose favor the preference was created. If of equal qualification, however, he would not necessarily be entitled to the position or office, for all might prove to be disqualified, and therefore to render his employment or appointment obligatory and enforceable by proceedings in mandamus, it is further exacted that he must be of good moral character and

able to perform the duties of the position applied for. Such is the plain meaning of the law. But appellant argues that the provision relating to equal qualifications is general and must give way to the more particular specifications enumerated later on, and that bare competency and good moral character constitute the "equal qualifications" mentioned in the forepart of the section. That general terms followed by particulars included in them will often be controlled by the latter may be conceded. The trouble with appellant's contention is that the language employed by the lawmakers does not bring the statute within this rule; for preference is conferred only on such veterans as possess qualifications equal to those possessed by other candidates for the office or place. For no other is the preference provided. That some persons are better able to and will perform the duties of a position with greater efficiency than others, who are barely competent to discharge them, is recognized by every one, and it was not the design of the Legislature to deprive the State or any of its governmental subdivisions of the very best service attainable. To this end equality in the matter of qualifications is a condition to awarding any preference. So that the test to be applied in determining the right of preference is that of qualifications, and one of the purposes of the investigation is to enable the appointing officer or board to pass upon the comparative qualifications of the several candidates. Only by perverting the plain language of the statute can it be said that the only qualification to entitle to preference is that of good moral character and bare competence to perform the duties of the office. This provision is inserted as a prerequisite to any appointment and has no relation to the comparative qualifications of the respective applicants for position in determining the right to preference.

We conclude that the demurrer was rightly sustained, and the judgment is *affirmed*.

134	505
1134	582
134	505
137	370
134	505
1139	72

STATE OF IOWA, Appellant, v. LAFAYETTE YOUNG.

State Binder: CHARACTER OF WORK: DETERMINATION BY SECRETARY OF

1 **STATE: COLLATERAL ATTACK.** The determination by the Secretary of State in accordance with Code, section 120, that the State Binder has done his work in compliance with law is final and cannot be collaterally attacked.

State Binder: OVER-PAYMENT: RECOVERY. Over-payment to the

2 State Binder for work done for the State under the Statute fixing the compensation is not a voluntary payment and the State is not concluded thereby, although paid on the certificate of the Secretary of State whose duty it is to compute the amount owing from an examination of the work; and it is immaterial whether the overpayment was made through mistake or design.

Right of jury to exhibits. In an action to recover over-payments

3 made to the State Binder on the theory that he had bound pamphlets with covers, and there was an issue as to what constitutes a cover, it was error to refuse an application to permit the jury to take the pamphlets, received in evidence upon the trial, with them to the jury room.

Appeal from Polk District Court.—HON. JAMES A. HOWE,
Judge.

THURSDAY, JANUARY 17, 1907.

REHEARING DENIED, MONDAY, MAY 20, 1907.

THE defendant was the duly elected and qualified binder of the State of Iowa for two years beginning January 2, 1899, and the plaintiff claims that during that period he was overpaid by the State for work done in that capacity. The petition in the first count alleges that he was paid for binding a large number of pamphlets and documents with covers, when these were in fact bound without covers. The items, with the amounts paid, together with the fees allowed by statute for binding without covers, are as follows:

	Amount Paid.	Stat- utory Price.	Overpay- ment.
24,000 copies memorial day pamphlet....	\$192 00	\$ 36 00	\$156 00
15,000 copies school district pamphlet....	120 00	22 50	97 50
20,000 copies bird day pamphlet.....	160 00	30 00	130 00
10,000 copies election law pamphlet.....	45 00	15 00	30 00
5,000 copies election law document.....	49 00	7 50	41 50
35,000 copies school law pamphlet.....	280 00	52 50	227 50
20,000 copies circular of information pam- phlet	160 00	30 00	130 00
500 copies mining laws pamphlet.....	4 00	75	3 25
1,000 copies treasury department circu- lar No. 8 document.....	8 00	1 50	6 50
3,000 copies of treasury department circu- lar No. 9 document.....	7 50	4 50	3 00
1,000 copies treasury department circular No. 10 document.....	2 50	1 00	1 50
64,200 copies monthly review crop service document	529 84	96 30	433 54

It was also alleged in this count that 35,000 copies of manual for normal instruction pamphlet, of 84 pages, was side-stitched, trimmed, and bound without a cover; that it consisted of signatures gathered by placing one signature upon another, and in that manner were bound together by being wire side-stitched; that defendant was paid 15 cents for each signature in the pamphlet, instead of 15 cents for each pamphlet, or in all \$262.50 instead of \$52.50, as allowed by statute. It was farther alleged that there was an overcharge for binding 6,000 bar dockets of the Supreme Court; that the signatures were folded and gathered, by placing one on another, and side-stitched and bound without cover; that he was entitled therefor to but \$9. whereas he received \$210. It is also alleged that he was overpaid for binding the annual report of the executive council of the State, and \$5.40 for binding three copies of the annual report of the dairy association. All these items amount to \$1,740.80, for which recovery was demanded.

In the second count of the petition it is alleged that a large number of reports of state officers were sewed in being bound, when the law required them to be stitched. These items, with the amount paid and the prices alleged to be fixed by law, are as follows:

	Amount Paid.	Stat- utory Price.	Overpay- ment.
(1) 1,500 copies of the biennial report of the Auditor of State for 1899	\$240 00	\$101 10	\$138 90
(2) 4,500 copies of the insurance report of the Auditor of State for 1899	720 00	295 20	424 80
(3) 2,500 copies of the biennial report of the Treasurer of State for 1899	400 00	123 50	276 50
(4) 1,500 copies of the biennial report of the state board of health for 1899	240 00	111 90	128 10
(5) 923 copies of the report of the Railroad Commissioners for 1897	148 58	52 24	96 34
(6) 1,000 copies of the report of the Railroad Commissioners for 1898	160 00	45 80	114 20
(7) 1,000 copies of the report of the Railroad Commissioners for 1899	160 00	47 60	112 40
(8) 1,000 copies of the first biennial re- port of the board of control...	160 00	125 00	35 00
(9) 3,000 copies of the biennial report of the Superintendent of Pub- lic Instruction for 1899	480 00	159 00	321 00
(10) 3,000 copies of the biennial report of the adjutant general for 1899	480 00	240 00	240 00
(11) 4,500 copies of the insurance report of the Auditor of the State for 1900, volume 1	720 00	287 10	432 90
(12) 4,500 copies of the insurance report of the Auditor of State for 1900, volume 2	720 00	303 30	416 70

It is also alleged as a part of this count that he overcharged the sum of \$200. for binding the report of the proceedings of the Academy of Sciences. Recovery is demanded on this account for \$2,896.84. The State averred that payment of these items was made by mistake of the Secretary of State, and that repayment has been demanded and refused.

In answering, the defendant admitted having received the various sums as alleged in payment of the work done, but denied that any pamphlets or documents paid for as being covered were without covers, and denied that any of the charges were other than those fixed by law and to which he

was legally entitled. By way of affirmative defense he alleged that the bills for the several items enumerated were presented to Hon. G. L. Dobson, then Secretary of State, who made due examination thereof, and, with knowledge of all the facts touching the defendant's right to compensation, audited, adjusted, and allowed the several amounts as having been earned in accordance with the provisions of law, and certified them as correct to the Auditor of State, who issued his warrant thereon as by statute required, and such warrants were honored by the State Treasurer. The defendant avers that the payments so made were voluntary, and that in any event the Secretary of State was clothed with full authority to pass upon and allow the amounts to which the defendant was entitled for work, and having done so, and certifying said amounts, the entire matter has been adjudicated and is not open to farther investigation.

At the close of the evidence for the State, the items of the second count were withdrawn from the jury. The issues raised on the first count were submitted, and a verdict returned for the defendant, on which judgment was rendered. The State appeals.—*Reversed.*

Chas. W. Mullen, Attorney General, for the State.

Carr, Hewitt, Parker & Wright, for appellee.

LADD, J.—The defendant was the duly elected and qualified State Binder of the State of Iowa for the term of two years beginning January 2, 1899, and the plaintiff claims that during such period he was overpaid for work done in that capacity. Section 141 of the Code fixes the prices which shall be paid:—

For all work done for the State in an acceptable manner, as in this chapter provided: (1) For folding and trimming all documents not stitched, ten cents per hundred copies; (2) for folding, trimming, and stitching documents not covered, fifteen cents per one hundred copies; (3) for

folding, stitching, and binding in paper covers all messages, reports, documents, not exceeding one sheet, allowing sixteen pages for a sheet, eighty cents per hundred copies of sixteen pages or less, and for each additional sheet of sixteen pages or less, eighteen cents per one hundred copies, the cover not to be counted; (4) for folding, sewing, and binding in paper covers the journals of the two houses, sixteen cents per copy; (5) for folding, sewing, and binding in muslin or cases, with gilt letters, the lettering and general style of the books to be the same as reports heretofore published, fifteen cents per copy for a volume of one hundred and fifty pages or less; twenty-one cents per copy for a volume containing one hundred and fifty pages, and not more than four hundred pages, and for each additional one hundred pages or fraction thereof, four cents; for folding, sewing, and binding Agricultural and Horticultural Society reports in board covers with muslin backs, similar in style with the Acts of the General Assembly, eighteen cents per copy; (6) for folding, sewing, and binding in half-sheep, with gilt letters for title, the lettering and general style of the books to be the same as documents heretofore published, twenty-six cents per copy for each volume of four hundred pages or less, and four cents for each additional hundred pages or fraction thereof; (7) for folding, stitching, and binding the Acts and Resolutions of each General Assembly in boards, with muslin backs and paper sides, same as Laws of 1886, ten cents per copy; (8) for folding, sewing, and binding in law sheep, same style as the reports of the Supreme Court fifty cents per copy for each volume of five hundred pages or less, and four cents for each additional one hundred pages or fraction thereof; (9) for ruling he shall be allowed the sum of seventy-five cents per hour for time actually employed; (10) for binding the Iowa Official Register, eight cents per copy for the first ten thousand copies, and six cents per copy thereafter.

It will be observed that all the items included in the second count of the petition, except one, were for binding the reports of State officers, and therefore the work should have been done in accordance with subdivision 3 and compensation made as provided therein. The difference is that the reports should have been "stitched," but instead were

"sewed," and the defendant was paid prices accordingly as fixed in subdivision 4. How this came about does not appear in the record, as this count of the petition was withdrawn from the jury, and there was no occasion for such proof. It is to be noted, however, that the State Binder did not overcharge for the character of the work done, but did a different, as the evidence tended to show, and a more costly, kind of work than the statute contemplated. In the process of sewing one signature (a sheet of paper to be folded into four, eight, or sixteen pages) is folded and placed on another until the back is completed, grooves are then cut in the back, cords inserted therein, and each signature sewed to these cords. A pamphlet is stitched by stabbing holes through the back, inserting thread or wires, and tying them. The itemized bills were presented to the Secretary of State, who, upon examining the same, certified to the several amounts as having been earned by the binder, and the State Auditor, as required by section 121 of the Code, drew warrants in his favor therefor on the Treasurer of State, by whom they were paid. In short, the State binder was paid sixteen cents per copy, when the law authorized payment of but eighty cents per one hundred copies of sixteen pages or less, and for each additional sheet of sixteen pages or less eighteen cents per one hundred copies, the cover not to be counted. It is not questioned but that the mistake of the Secretary was one of law, and not of fact, though it seems scarcely possible that a mistake of law could have been made. The statute quoted is the only one with reference to the manner of binding these reports, and paragraph 3 thereof plainly indicates that they were to be stitched. No compensation for binding them otherwise than therein directed is to be found in the Code or subsequent acts of the Legislature. It was impossible to confuse this paragraph with any other, and especially with paragraph 4, under which payment was made, for the latter is limited to the Journals of the two houses of the General Assembly.

But, conceding it to have been a mistake of law, it is contended on the part of the defendant that the payment was voluntary, and that the decision of the Secretary of State is conclusive against the State as well as the defendant. Section 120 of the Code provides that "the Secretary of State, upon completion of any printing or binding for the State, or the presentation of any bill for such printing or binding, shall make examination of the work done, and ascertain whether it has been done in accordance with the provisions of this chapter. If he finds there has been a compliance herewith, he shall certify the same, stating the amount to which the officer presenting the bill is entitled. In case such work has not been properly done, or any item of said bill has not in his judgment been earned, he shall refuse to certify as to such item, or shall state what reduced amount, if any, the officer is entitled to as compensation for such defective work." This does not authorize the Secretary of State to fix the price at which the work shall be done, nor to re-classify the reports and other documents to be bound. In so far as he is called upon to audit the accounts of the State binder as presented, he acts in a ministerial capacity, and makes the computation and executes the certificate merely to enable the binder to draw his compensation. His duties therein are somewhat like those of the board of supervisors in allowing claims against the county, or those of the city or town council in auditing claims against a municipality. These bodies represent the corporations for which they act. *Campbell v. Polk County*, 3 Iowa, 467; *Hospers v. Wyatt*, 63 Iowa, 264; *Clark v. City of Des Moines*, 19 Iowa, 199. The finding of such bodies is in no sense an adjudication, to be regarded as *res adjudicata*. The allowance of a claim presented is in the nature of settlement between individuals, and is accorded no greater effect. *Poweshiek County v. Stanley*, 9 Iowa, 511. And, in the absence of fraud or mistake, the allowance of a claim by such body can no more be

1. STATE BINDER:
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work: determi-
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eral attacks.

set aside than an adjustment of different items between individuals. *Poweshiek Co. v. Stanley*, *supra*; *Commissioner's Court v. Moore*, 53 Ala. 25. Even to be accorded such effect as will hereafter appear, the items allowed must be such as might have been considered by the board or council, and, if prohibited by law, the municipality will not be bound by the action of its agents.

The statute also confers upon the Secretary of State quasi judicial powers, for he is to determine whether the binding has been done in compliance with law; that is, when passing upon the bill for binding these reports, he is to determine whether they were bound as exacted by the third paragraph of the section of the Code quoted. If any of the work, or any item thereof, has been improperly done, he may reject the whole, or any particular item or items, and certify to the bill for that portion of the work done properly. In other words, he is to examine into the facts, and to determine from such investigation whether the items have been earned. To this extent his decision must be regarded as conclusive. Having the power to act, he had jurisdiction to decide, and if he decide wrongly, and error was committed in doing so, he did not usurp an unconferred jurisdiction. In other words, the authority to determine in no wise depends on the nature of the decision to be rendered. The power to decide necessarily carries with it the power to decide wrong, as well as right. Men are so fallible, and human discernment so imperfect, that the power to hear and determine necessarily carries with it the power which makes the determination obligatory, without reference to the question of whether it be right or wrong. If this were not so, the judgment of a court or the finding of a board authorized to decide would be of no particular value; for either might be attached or avoided at pleasure upon the ground that the board or court had made a mistake. There ought to be a time when such controversies end, and when the authority is conferred upon the officer or board to pass thereon, the

determination, even though erroneous, ought not to be assailed for want of jurisdiction. As well attack the judgment of a court collaterally on the ground of error in rendering it. The principle is well established that, if a matter in which a question is involved is given over to an officer for his determination, his decision is final. See *Wymans*, Adm. Law, section 116; *Foster v. U. S.*, 32 Ct. Cl. (U. S.) 170; *Litchfield v. Register & Receiver*, 9 Wall. (U. S.) 575 (19 L. Ed. 681); *U. S. v. Com.*, 5 Wall. (U. S.) 563 (18 L. Ed. 692); *Cary v. Curtis*, 3 How. (U. S.) 236 (11 L. Ed. 576). In determining whether the work had been done in compliance with the statute, the Secretary of State was called upon to investigate, and in determining the question necessarily exercised his judgment and discretion, and, under all the authorities, the determination of the officer in such circumstances is regarded as in the nature of an adjudication and may not be assailed collaterally. Nor is the State demanding to do so in this case.

It is conceded that the Secretary held the work to have been properly done, and of this no complaint is made. The contention of the State is that, though properly done, the Secretary certified that the State Binder was entitled to an amount of compensation therefor in excess of the fees fixed by law, and this is conclusively shown by the record before us. Under these circumstances, can the payment of the excess to the State Binder be regarded as voluntary? Where the amount to be paid is definitely fixed by law, as a salary, the State is universally held not to be bound by a mistake in amount paid by the officer issuing the warrant. Such officer is regarded as the trustee or agent of the State, and in making any payment other or in excess of that to which the law allows is plainly acting beyond and outside the scope of his duty; and this is not only within his knowledge, but that of him with whom he deals, for every one is presumed to know the law. There is a broad distinction between the acts of a

2. STATE BINDER:
overpayment:
recovery.

public officer in this respect and the agent of an individual or private corporation. In the case of the latter, it is enough that the agent be clothed with apparent authority and that third persons deal with him innocently. Then, even though he violated his private instructions, the principal is bound. Good faith requires this much, for the principal has held him out as competent to act.

But it is not so with public officers acting in a ministerial capacity. Their authority is written in the statutes. All men are charged with knowledge of the extent of such authority. Necessarily they must know when their powers are exceeded, and act at their peril. Thus, in *Ellis v. Board of State Auditors*, 107 Mich. 528 (65 N. W. 577), an amendment to the Constitution was supposed to have been adopted increasing the salary of the Attorney General and he was paid accordingly. Upon a recount it was discovered that the amendment had not received the approval of the electors, and that officer was declared liable to the State for the amount paid him in excess of the salary fixed by law. In *Com. v. Field*, 84 Va. 31 (3 S. E. 883), the Auditor of State issued his warrant to the Attorney General for fees taxed in certain cases to which the latter was not entitled, and the Commonwealth was allowed to recover. To the same effect see *State v. Hastings*, 10 Wis. 525, 535; *County of Allegheny v. Grier*, 179 Pa. 639 (36 Atl. 356); *Smith v. City of Newburgh*, 77 N. Y. 130; Mechem on Pub. Off., section 512. The principle is unassailable, for in such a situation there is no adjustment or controversy, but the open payment by the officer out of the public treasury of something that is not owing, and each party is conclusively presumed as a matter of law to be fully aware of the fact. The officer not only exceeds his actual, but his ostensible authority, and the payment, as between the State and party receiving payment, is *ex æquo et bono*. This appears from *Heath v. Albrook*, 123 Iowa, 559, where warrants were issued by the county auditor to an attorney for services the

board of supervisors were unauthorized to employ him to render, and in approving a decree directing repayment, for the benefit of the county, we there said: "As the moneys paid were not pursuant to any compromise of legal rights, or in the settlement of any dispute, and it being determined that defendants had no legal or equitable right to the money thus paid, the conclusion is irresistible that the decree of the trial court was right and should be sustained."

There are decisions holding that payments of claims in mistake of law by public officers may not be recovered; but these are planted either on the theory that the allowance of a claim is an adjudication, as *Heald v. Polk Co.*, 46 Neb. 28 (64 N. W. 376), and *County of Richland v. Miller*, 16 S. C. 236, a doctrine which, as seen, does not obtain in this State, or that the payment is voluntary. *State v. Ewing*, 116 Mo. 129 (22 S. W. 476); *Painter v. Polk Co.*, 81 Iowa, 242. These last cases rest on the proposition that voluntary payments by a public officer may not be distinguished from such payments by an individual. See *Kraft v. City of Keokuk*, 14 Iowa, 86; *Ahlers v. City of Estherville*, 130 Iowa, 272. This is not so, as was clearly pointed out in *Heath v. Albrook, supra*, in overruling *Painter v. Polk County, supra*; for the individual acts for himself, and no question of exceeding his authority is involved when he makes payment to an officer or other person. Money cannot be taken from the public treasury lawfully, save for the purposes and in amounts as directed by statute, and the officer, in doing so, acts, not for himself, but in behalf of the public; and, if he does so in violation of law, he necessarily exceeds his authority, and the public is no more bound by his act than is any principal by the unauthorized act of his agent. It is to be noticed that the opinion in the *Painter* case was based on a decision of the Supreme Court of the United States which expressly recognized this principle, but denied recovery of a salary paid Gen. Badeau on the ground that he was a *de facto* officer during the period for which he

had received it. See *Badeau v. U. S.*, 130 U. S. 439 (9 Sup. Ct. 579, 32 L. Ed. 997). That case, as said, was overruled by *Heath v. Albrook, supra*, and all the more recent opinions are to the effect that the rule with respect to voluntary payment by individuals has no application, where ministerial officers have made illegal payments of public money to public officers. These proceed upon the ground that such officers are merely the agents of the public, and, in acting beyond the scope of their authority do not bind their principals. In other words, the mistake is the mistake of the agent, and not that of his principal. The officer may have thought that he had authority of law to make payments or to execute certificates upon which payments should be made; but in this he was mistaken. *Ellis v. Board of State Auditors*, 107 Mich. 528 (65 N. W. 577); *State v. Washoe Co. Com.*, 14 Nev. 66; *Commissioners v. Heaston*, 144 Ind. 583 (41 N. E. 457, 43 N. E. 651, 55 Am. St. Rep. 192); *Board of Supervisors v. Ellis*, 59 N. Y. 624; *Jones v. Com. of Lucas Co.*, 57 Ohio St. 189 (63 Am. St. Rep. 710, 48 N. E. 882); *Wayne County v. Reynolds*, 126 Mich. 231 (85 N. W. 574, 86 Am. St. Rep. 541); *Ada Co. v. Gess*, 4 Idaho, 611 (43 Pac. 71); *Jefferson Co. v. Patrick*, 12 Kan. 605; *Union County v. Hyde*, 26 Or. 24 (37 Pac. 76).

In *Board v. Ellis, supra*, it was held that the board of supervisors had no power to audit a bill not legally chargeable to the county, and that, if they did, and it was paid, such payment was not voluntary, and an action would lie to recover back the money paid; the court saying: "A board of supervisors has no power to audit and allow accounts not legally chargeable to their county, and, if it attempts to do so, it is an act in excess of jurisdiction, without the power to make it valid, and is null and void." In *Wayne Co. v. Reynolds, supra*, the court, after conceding that, where the officer or board is authorized to adjudicate upon the claims, payments thereon will be binding, said: "We have

found no case which precludes such recovery when a board has allowed a claim which was wholly fictitious, or expressly forbidden by law, and with one or (possibly) two exceptions the same may be said of claims which the law does not recognize as valid charges against the municipality." In that case the clerk of the county had been allowed compensation as secretary of a committee of the board of supervisors, which was prohibited by law, and in holding that recovery of the amounts paid might be had by the county the court overruled the earlier case of *Wayne County v. Randall*, 43 Mich. 137 (5 N. W. 75). In *Com. v. Heaston*, *supra*, the court said, in regard to the payment of an illegal claim by the board of supervisors: "It was no payment by the county. The latter has properly had no part in the payment. It could not, as a public corporation, be held to consent to the payment or expenditure of the public money in defiance of law. Awarding to the appellee this money, under the alleged facts, was in a legal sense equivalent to the unlawful appropriation of the county's money to his own use by the aid of its board of commissioners. The allowance and payment of the money being unlawful, the commissioners did not act within the scope of their authority, and therefore did not bind the county. . . . If the appellee has received and has the money of the county under such circumstances that in equity and good conscience he ought not to retain same, and which *ex æquo et bono* belongs to the county, an action for recovery will lie in favor of the latter. . . . If, under the facts of the case at bar, we should place the construction on the law as contended by appellee, then a way would be paved by which it would be rendered easy for any person, under the guise of the legal claimant against the county, through the aid of its commissioners, if the latter were inclined to close their eyes to legal prohibitions, to unlawfully obtain and appropriate to his own use the public money, and, when called upon in a court of justice to account for the same, deny the right of the county's recovery

upon the ground of *res adjudicata*. Such, in reason, is not the law." On rehearing it was said that "the money might be said to have been obtained by him [claimant] by virtue of the illegal act of the commissioners in allowing the claims."

Our conclusion rests on the general principle that the public is not bound by the acts of its officer, when outside of or beyond the scope of their authority. The public law, of which courts and individuals are bound to take notice, and of which no party can claim ignorance, is the source of the power of the Secretary of State, as well as every other official, defining such power with clearness and certainty. It does not clothe him with authority to create any new claim, or to amend statutes, or to increase the compensation of any other officer with whom his duties are connected; and, to support the bills he has certified in behalf of the State Binder, resort must be had not to his act in certifying, but to the statutes fixing the compensation to which the latter official is entitled. If payments have been made, owing to his certificates computing compensation at higher rates than those fixed by law, these, to the extent of the excess, cannot be regarded as voluntary. The money, but not the title thereto, has been transferred, and restitution may be enforced in an appropriate action. Any other rule, especially one which would countenance the contention of appellee that a public officer who has received money from the public treasury from another public officer without warrant of law may obviate restoration to the owner, the public, on the pretext that the paying officer misconceived his duty to the public, would encourage official corruption by collusion and be opposed to sound public policy. The Secretary of State was authorized to compute the amount owing the State Binder from an examination of the work done; *i. e.*, the number of reports bound and the number of sheets included in each report. It does not appear that any mistake was made in so doing. The bills were correct in every respect, save that

an amount in excess of that authorized by law was charged for binding each report and was certified to be due the Binder by the Secretary of State. The case is analogous with those in which a salary or item of fees in excess of those allowed have been paid. The statute, having fixed the compensation, by fair implication prohibited anything in excess of that allowed. Both the State Binder and Secretary of State are conclusively presumed to have known the law, and, therefore, that the former was not entitled to such excess, and that it was being extracted from the public treasury in violation of law. The rectitude of intention on the part of these officers, to which our attention has been directed, can make no difference. As observed in a somewhat similar case (*Allegheny Co. v. Grier*, 179 Pa. 639 (36 Atl. 353)): "Public revenues are but trust funds, and officers but trustees for its administration for the people. It is no answer to the suit brought by a trustee to recover private trust funds that he had been a party to the devastavit. With much stronger reason is this doctrine applicable when the interests of the whole people are involved. It is obviously immaterial whether the illegal payment be through design or mistake." Compensation for work performed, or fees or salary earned, when fixed by the General Assembly, cannot be increased in this way, and any amount paid out of the public treasury by an officer, other than or in excess of that specified by statute, may be recovered back. It follows that the court erred in directing a finding for the defendant on the second count.

II. What has been said disposes of all the items claimed save those in the first count for overcharges in the matter of covers. As will be recalled, it is alleged that the State Binder was paid for binding certain pamphlets as covered, when in fact they were not, and the issue thus raised was submitted to the jury. One copy of the report of each officer, as presented to the Secretary of State, was introduced in evidence,

3. RIGHT OF JURY
TO EXHIBITS.

and, before the jury were instructed, the Attorney General demanded that they be allowed to take these with them upon their retirement to deliberate on their verdict. This was denied; the court saying that, in view of the fact that the question of whether said pamphlets are covered or not being a question to be determined from the expert testimony, it would not be proper to permit the jury to take said pamphlets and allow them to use them in determining from their own knowledge, as well as from expert testimony, whether they are covered or not, although they may be used in argument to the jury. The practice in trials at the common law was against allowing the jury to have the papers introduced in evidence. *Farmers' & Manufacturers' Bank v. Whinfield*, 24 Wend. (N. Y.) 419. The reasons for this have disappeared, and, in the absence of statute, it is now pretty generally held to be discretionary with the trial court. *People v. Cochran*, 61 Cal. 548; *Canning v. Harlan*, 50 Mich. 323 (15 N. W. 492); *Starke v. Wolf*, 90 Wis. 434 (63 N. W. 755; 12 P. & P. 390 *et seq.*). Our statute provides that, "upon retiring for deliberation, the jury may take with them all books of accounts and all papers which have been received as evidence in the cause, except depositions, which shall not be taken unless all the testimony is in writing and none of the same has been ordered to be struck out." The language is not mandatory, and therefore the court, in the absence of a request, does not err in omitting to send the papers out with the jury. *German Savings Bank v. Citizens' National Bank*, 101 Iowa, 530. The court may properly do so on its own motion or at the instance of the jury. *Barker v. Town of Perry*, 67 Iowa, 146; *Peterson v. Haugen*, 34 Iowa, 395. When requested by either party, the papers and books received in evidence should be sent out with the jury, and refusal to do so is error, which, like other errors occurring during the trial, will be presumed to have been prejudicial, unless the record indicates otherwise.

The appellee insists that, owing to the nature of the

issue, no prejudice could have resulted from not allowing the jurors to inspect the pamphlets. None of these had covers in the sense of that word as commonly understood. But there was evidence tending to show that the word "covers" has a meaning peculiar to the binder's trade, and the issue submitted to the jury was whether the pamphlets were bound with covers, as the term is used by persons engaged in the trade or business of binding pamphlets. Two witnesses called by the State, and eight called by the defendant, as well as the latter, testified that, when one signature (a sheet which is folded so as to make four, eight, or sixteen pages) is folded and inserted into another so folded, the latter, in binder's parlance, is regarded as a cover. One witness on the part of the State testified that none of the pamphlets had covers, and that, prior to the trial, he had never heard of the outside leaves of a pamphlet being called a cover, nor that, by inserting one folded signature inside of another, the outside leaves would thereby become a cover. Another witness was of the opinion that part of the pamphlets were without covers and the remainder with them. It thus appears, then, that the jurors were called upon to determine (1) whether the term "covers" was employed in the trade or business of binding with the meaning as contended by the appellee; and (2) if so, whether all the pamphlets were bound. In determining either issue, the jury was entitled to pass upon it in the light of their experience, common sense, and judgment. The evidence of the experts was valuable in aiding them to reach a correct conclusion, and possibly there may be cases where the facts are so exclusively within the knowledge of experts that the decision should be based on their testimony alone. But here there was a dispute as to whether the word "covers" had any different meaning among binders than that accorded it in common parlance, and certainly an examination of the pamphlets said to be bound, in the light of the evidence of the experts, would have assisted the jury in passing upon that issue. In determining

such a question, the reasonableness of the different contentions is of great importance, and in no better way could this be brought home to the jury than by looking at the pamphlets themselves.

This thought is emphasized by the suggestion of counsel for appellee that the jury could not ascertain from such inspection whether the pamphlets were bound or not; that even the experts experienced great difficulty in ascertaining the fact. If this were so, and the covers of such character as to be imperceptible, it was a circumstance to be considered in saying whether the claim that there were covers was but a myth, as intimated by State's witness, or were such as recognized by the trade. It would seem, however, that if one signature were placed within another, instead of one signature on top of another, after being folded, this ought to be apparent from an examination of the pamphlets; for in that event the two outside leaves must have been a part of the same sheet, and, if so, this could have been ascertained by an examination. This is evident upon examining any pamphlet without covers, as commonly understood. The briefs and abstracts of this court are usually bound by stitching, the folded signatures being placed one on top of the other; but occasionally one signature is inserted within another, leaving one sheet, or part thereof, constituting outside pages or cover, as defined by the witnesses for the defendant. This being so, it is evident that an inspection of the pamphlets introduced in evidence would have been of assistance in deciding the issue whether they were "covered," in the sense that term was employed by the witnesses for defendant. The pamphlets were a part of the evidence in the case, and the court erred in withholding them from the inspection of the jury, and in withdrawing them from its consideration as was done in the fourth instruction. The testimony of the experts was in conflict, and in weighing the evidence and determining which should be accepted the jurors should have been allowed to compare such testimony

with the other evidence in the case and exercise their judgment in the light of their experience, common sense, and common knowledge.

Owing to the errors pointed out, the judgment of the district court is *reversed*.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellee, v. V. C. HEMENWAY, ET AL., Appellants.

134	523
141	742
134	523
143	366
143	786

Appeal: REVERSAL: REHEARING IN TRIAL COURT. A plaintiff who has suffered a reversal of his decree on appeal, may, in the discretion of the trial court have the former submission set aside for the purpose of a further hearing, upon a proper showing to that end; but this rule does not authorize the court to permit him, without tendering a different issue, to offer additional evidence and again submit his case upon a different theory.

Appeal from Dickinson District Court.—HON. W. B. QUARTON, Judge.

MONDAY, MAY 20, 1907.

ACTION to quiet title to real estate. There was a decree in favor of plaintiff, and defendants appeal.—*Reversed*.

L. E. Francis, for appellants.

George E. Clarke, for appellee.

BISHOP, J.—This is the second appeal in this case. The opinion on the former appeal, reversing a decree of the court below, rendered in favor of plaintiff, will be found in 117 Iowa, 598. On reference to that opinion, it will be observed that the lands in controversy are part of a grant made by the general government to this State to aid in the construction of a railway; the particular tract being within what

is known as the "indemnity limit." It will also be observed that the sole matter at issue was whether such lands were taxable after being earned by the railway company, but before the issuance to it of a patent. The record as made on that submission is included in the record now before us, and it seems to have been conceded that the lands had been earned long prior to the tax levy and sale of which plaintiff complains. And there was neither allegation nor attempt at proof respecting the time when the land had been selected by the railway company or the selection approved. The issue as made was there determined in favor of the right to tax; the court observing that, in the absence of proof, a selection of the land by plaintiff prior to the assessment and levy of the tax must be assumed. Following the filing in the District Court of the procedendo issued out of this court, plaintiff appeared in that court and moved to set aside the former submission, and for a retrial of the case. The grounds of the motion were set forth in an affidavit of counsel annexed thereto, and in substance were these: That at the time of the former trial and submission of the case affiant was informed by the officials of the United States Land Office, located in Des Moines, that the date of the selection by plaintiff of the lands in controversy was prior to the year 1885, and that the approval of such selection was also prior to said year. That he has since discovered the facts to be that the selection was made in March, 1872, but that no approval thereof took place until September 7, 1895. And affiant says that he did not know, and with reasonable diligence could not have ascertained, the erroneous character of the information so imparted to him, and that he did not become advised of the true facts until about March, 1903. The defendants appeared to the motion, and filed objections thereto and a motion to strike. The objections challenged the legal right of plaintiff to a retrial; challenged the good faith of the motion, and the legal sufficiency thereof, as well as the materiality of the matters stated in the affi-

davit of counsel. On submission, defendants' objections and motions to strike were overruled, and plaintiff's motion for retrial was sustained. Thereafter, the case coming on for hearing on merits, plaintiff offered and read all the evidence taken and received on the original hearing, and, in addition thereto, made proof that the land in question had been selected by the railway company in March, 1872. There was then introduced and read in evidence an official communication of date October, 1895, addressed by the Commissioner of the General Land Office at Washington to the register and receiver of the land office at Des Moines, advising the latter that the land in question was approved for the plaintiff company September 17, 1895, and patented for it September 21, 1895, also directing that such matters be entered of record in the Des Moines office. The case was then again submitted, and the decree quieting title in plaintiff here appealed from followed.

The primary contention of appellants — and we shall have no occasion to discuss any other — is that the court erred in sustaining plaintiff's motion to set aside the former submission and in granting a further hearing. Now, in general, remand of a case in equity after reversal of the decree takes it back for a decree in harmony with the opinion. The case does not go back for a new trial. It is true, however, that a plaintiff who has suffered a reversal in this court of a decree may go into the District Court, and, on proper showing, and for proper purposes, have the former submission in that court set aside and the case opened for the purpose of a further hearing. *Adams Co. v. Railroad*, 44 Iowa, 335. Leave to do so, however, is discretionary with the court, and may not be demanded as matter of right. It will be granted only in furtherance of justice, and the showing must be such as ordinarily would entitle a party to a new trial — thus, to permit the introduction of material evidence, omitted by excusable inadvertence, or where material evidence, not cumulative, has been discovered since

the submission, and which could not have been sooner discovered in the exercise of reasonable diligence, or because of matters materially affecting the rights of the parties happening subsequent to the decree, and the like. *Austin v. Wilson*, 57 Iowa 586; *Adams Co. v. Railway*, 55 Iowa, 94. But, as said in the case last cited, "a party cannot be allowed to try his case by installments or piecemeal. Such a practice would make litigation practically endless." Much less can a party who has tried and submitted his case on one theory be allowed after a reversal to go back to the District Court, and, either upon reformed issues or by the introduction of further evidence, again submit his case upon another and different theory. Now, on original submission, the proposition on which plaintiff staked its case was that taxation was not allowable until a patent had been issued, while the proposition on which defendant relied was that taxation was allowable as soon as the lands were earned. This court, as we have seen, took middle ground, and held that, as the lands were not within place limits, taxation must await selection.

With the state of the law and the fact situation in mind, we may now turn our attention to the character of the showing for retrial made by plaintiff. Reduced to a sentence it is this: That at some time prior to the decree first entered counsel for plaintiff was misinformed by the officials of the land office at Des Moines as to the date on which selection of the lands had been made by plaintiff, and the date on which such selection had been approved; that, in view of the grounds on which the reversal of the decree was placed, such dates had become material. Added to this is an averment in general terms of ordinary diligence. We do not see how this showing can be held sufficient. Individually, counsel may not have known of the date of selection, but we do not see how plaintiff could be in doubt as to such date. It had made the selection, and must be held to have known that this occurred, as was subsequently shown, in the year 1872.

But, conceding the misinformation, how was plaintiff prejudiced thereby or misled to its injury? No attempt had been made on the trial to prove such dates, and the failure in this respect was not due to any inadvertence. They were wholly immaterial to plaintiff's theory of its case. Of course, the evidence as to the dates was not newly discovered as of the date of the motion for retrial. And plaintiff had discovered the truth as to such dates as soon as in its view there was any occasion to make use of them. The situation resolves itself down to this: plaintiff selected the ground upon which to wage its controversy for title to the land, and was defeated. Then it came back, and, without even tendering any new issue, demanded that it be allowed to select different ground, fortify the same by additional evidence, and again submit its claim for title. We think the court below exceeded its discretion in acceding to such demand, and hence that its ruling was error. This conclusion finds further support in the following cases: *Shorthill v. Ferguson*, 47 Iowa, 284; *Sgandy v. Glass Co.*, 68 Iowa, 542; *Leach v. Association*, 102 Iowa, 125.

It follows that the decree appealed from must be, and it is, reversed, and the case is ordered remanded for a decree in conformity with our opinion on the former appeal.
— *Reversed.*

NATIONAL LOAN & INVESTMENT COMPANY ET AL., Appellees, v. THE BOARD OF SUPERVISORS OF LINN COUNTY, Appellant.

Intoxicating liquors: ASSESSMENT OF MULCT TAX: PROCEDURE.

Taxation in itself is the exercise of an extraordinary power and the procedure pointed out by statute for accomplishing the same must be strictly pursued; so that when it is sought to impose a mulct tax under the provisions of Code, section 2435, as amended, the citizens who are authorized to institute the proceeding must themselves serve the notice and make proof thereof, to confer jurisdiction upon the auditor to assess the tax; it cannot be done by another.

Appeal from Linn District Court.—HON. B. H. MILLER,
Judge.

MONDAY, MAY 20, 1907.

THE trial court annulled and set aside a mulct tax assessment made by the county auditor of Linn county, and the county, through its board of supervisors, appeals. — *Affirmed.*

C. G. Watkins, county attorney, and *Charles W. Kepler & Son*, for appellants.

F. L. Anderson, for appellees.

BISHOP, J.—On June 20, 1905, there was filed in the office of the county auditor of Linn county a paper signed by L. E. White, H. J. Wiley, and George Lantz, describing themselves as citizens of Marion, Linn county, which paper on its face purported to be a notice addressed to the plaintiff company, as owner, and the plaintiff Beck, as tenant, that the subscribers intended on June 29th to list with the auditor certain described real property situated in the city of Marion, the same being a place where intoxicating liquors were kept and sold in violation of law, for the purposes of an assessment and taxation under provisions of the Code relating to such subject. It is recited in the abstract before us that on June 21st this notice was given — it does not appear by whom — to a constable of the county for service, and on June 29th the constable filed the notice with the auditor with an affidavit of service as made by him. On the date stated, said White et al. filed with the auditor a verified statement to the effect that these plaintiffs were maintaining the premises in question as a place for the unlawful keeping and sale of intoxicating liquors. There was no appearance in response to the notice, and the auditor at once proceeded to assess a mulct tax. Thereafter these

plaintiffs appeared before the board of supervisors of Linn county, and in writing asked that the tax so assessed be canceled, and this upon the ground that the service of notice upon them had not been made by any of the citizens by whom such notice was signed, and no proof of service of such notice by an affidavit of one or more of such citizens had been made and returned to the auditor; that, on account thereof, the auditor had no jurisdiction to proceed to an assessment, and his act was illegal and void. The board of supervisors refused to cancel or remit the tax, whereupon an appeal was taken to the District Court. The case having been there submitted, the court found that service of notice had not been made as required by law, that the auditor was without jurisdiction, and the tax was annulled and set aside. This appeal followed.

Code, section 2433, provides that at stated times each township, town, or city assessor shall return to the county auditor a list of the persons engaged in the business of selling or keeping intoxicating liquors for sale, and the places of such business. By section 2435, as amended (section 2435, Code Supp. 1902), it is provided that: "Should the assessor for any reason fail to perform his duty, any three citizens of the county can . . . procure the listing of names and places with the same force and effect as if done by the assessor. At least five days before listing the property or names . . . such citizens shall give notice in writing of their intention so to do to the same parties [the owner and occupant of the property], . . . and proof of the service of notice shall be made by the affidavit of one or more of the citizens making the return, which affidavit shall be returned to and filed with the auditor with the list of names and property sought to be charged; and the return and affidavit of the citizens so filed shall be admissible in evidence," etc.

We have, then, the question, simple of statement, whether a county auditor acquires jurisdiction to proceed

to an assessment upon there being filed in his office a notice, service and return of which has been made by a constable, and not by the citizens signing the same. We think, as did the trial court, that the question must be answered in the negative. The purpose of the proceeding authorized by the statute is to levy and collect a tax; and the proceeding is unusual and extraordinary, in that it provides that three citizens may become a part of the taxing machinery of the State. Taxation, in itself, is the exercise of an extraordinary power, and, when it is proposed to take of the property of a citizen a portion to satisfy the necessities of government, the method of procedure pointed out by law must be strictly complied with. *Railroad v. Davenport*, 51 Iowa, 451; *Railroad v. Phillips*, 111 Iowa, 377; *Bradley v. Brown*, 75 Iowa, 180; *Grimes v. Ellyson*, 130 Iowa, 286; *Cooley on Taxation*, 285.

Accordingly, it is only where the statute requires a thing to be done, but fails to point out any particular form or manner of proceeding, that the taxing officers may select the method by which the object shall be attained. Here, by direct command of the statute, the citizens who are given place in the machinery provided to accomplish taxation are required to serve notice, and they must make proof by their own affidavit of the fact of such service. It follows that, until this is done, the auditor has no jurisdiction to proceed. It is as if the auditor himself was required to serve the notice, and make oath to the fact of his service before proceeding further. Surely such a requirement of statute could not be satisfied by service and proof thereof made by any person other than such officer. Why the Legislature saw fit to require service and proof thereof at the hands of some one of the three citizens acting in any given case, we shall not stop to inquire. It was a part of the proceedings made essential to a complete service in such cases, and the question why or wherefore is not for us to answer. As the statute was not complied with in the case

before us, it must be said that the auditor proceeded without jurisdiction, and the assessment made by him was void.—*Affirmed.*

E. L. FLINT, Appellee, v. ATLAS MUTUAL INSURANCE COMPANY, Appellant.

134 531
5142 433

Continuance: SURPRISE. Where an amendment is filed in the
1 midst of a trial which raises an entirely new issue going directly to the merits of the controversy, the other party is entitled to a continuance upon a showing of surprise and want of time to meet the issue thus raised; nor should the court hold the party to a very strict and formal showing in this respect where the claim for time is made in apparent good faith.

Instructions: RECITAL OF EVIDENCE: OMISSION OF MATERIAL ITEM.

2 Where the court in its instructions undertakes to epitomize the various matters of evidence which the jury may take into consideration on a given question, the omission of any material item bearing thereon is prejudicial error.

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

MONDAY, MAY 20, 1907.

The opinion states the case.—*Reversed.*

Berryhill & Henry, for appellant.

Thos. A. Cheshire, for appellee.

WEAVER, J.—On March 3, 1904, the defendant, a fire insurance company, issued its policy to one W. E. Brazelton indemnifying him against loss by fire upon a stock of drugs at Center Point, Iowa. By the terms of the policy the loss was made payable to the plaintiff herein as mortgagee according as his interest might appear. In January, 1905, the insured property was destroyed by fire.

In March, 1905, Brazelton assigned his interest in the policy to the plaintiff, who began this action to recover thereon in September, 1905. To this claim the defendant answered, alleging that, among the conditions on which the policy was issued, it was provided that, if the applicant for insurance should fail to truly state the extent of his interest in the property, the entire policy issued upon such application should be void, and it is alleged that Brazelton procured said policy upon a statement that he was the sole and undisputed owner of the property to be insured, when in fact he owned but one-half interest therein. As a further defense, it is alleged that by the terms of the policy sued upon it was to become void in case of any fraud or false swearing relating to said insurance, whether made before or after a loss occurred, and the defendant avers that after the property was destroyed the said Brazelton presented a duly verified proof of loss as the basis of his claim under said policy, in which proof of loss he falsely said that the insured property was not incumbered in any way, and in which he agreed to accept from said defendant in full of all claims under said policy, the sum of \$1,000. By a second count of its answer the defendant further avers that the value of the property lost by fire did not exceed the sum of \$1,000, and alleged that the proof of loss furnished by Brazelton was for that amount, and that Brazelton agreed to accept said sum of \$1,000 in full of all claims under said policy. The plaintiff filed a reply denying the averments of the answer, and upon the issues as thus joined the case proceeded to trial.

Before entering upon the trial the defendant filed a motion for continuance on account of the absence of a witness, one John M. Zane, which application was resisted by the plaintiff. The continuance was denied, and upon this ruling error is alleged. After the plaintiff had presented his testimony in chief, and rested his case, he presented and obtained leave to file an amendment to his reply, alleging that

the proof of loss and written agreement to accept \$1,000 pleaded in the defendant's answer was obtained from Brazelton while he was intoxicated and incompetent to transact business, and on the false claim and representation made to said Brazelton by John M. Zane, who was the defendant's adjuster, that a partnership existed between E. L. Flint, the plaintiff herein, and said Brazelton, and that for said reason the latter could not recover, and was not entitled to recover more than \$1,000, or one-half of the face of the policy, which statement by the adjuster said Brazelton in his drunken condition was fraudulently induced to believe. To the filing of this amendment the defendant objected, and after it was filed moved to strike the same as having been presented too late, but the objection and motion were overruled. Defendant's counsel then, by an oral statement to the court, taken down by the official reporter, represented that he was not prepared to meet the new issue presented by the amended reply. He alleged that the allegations in said amendment were a surprise to him, and that the defendant was wholly unprepared to present any testimony concerning the alleged intoxication and incompetency of Brazelton at the time of the execution of the paper referred to in said pleading, and that the defendant had no knowledge or notice that such matter would be alleged or made an issue in the case, and that time was necessary to prepare for trial of said issue and to obtain the testimony on part of the defense with reference thereto, and upon this representation asked that the case be continued for the term. The court again denied the demand for a continuance and to this ruling, also, the defendant has excepted and assigns error thereon.

We are of the opinion that the motion for continuance, as thus presented, should have been sustained. It may be

1. CONTINUANCE: said that the showing for a continuance as
surprise. first made, before the trial was begun, was
not so strong that its denial should be held to have been an

abuse of discretion on part of the trial court. But at that time the alleged fraud and imposition on part of Zane, the defendant's adjuster, was not in any manner charged or referred to in the pleadings; nor is there anything in the record to indicate that at that time the defendant could have been expected to foresee the necessity for being ready to meet and defend against a charge of that nature. It had been shown, on the issue made in support of the original motion, that the witness Zane was not within the jurisdiction of the court, and when the amendment to the reply brought a new issue and alleged fraud practiced upon Brazelton by said Zane, the importance of the presence of the latter as a witness on behalf of the defendant became very apparent. Whatever may be said of the lack of diligence on part of the defendant in securing the presence of Zane as a witness at the trial, it has no force, except with reference to the issues as stated at the time the original motion was filed. Defendant could not be held to anticipate the possible raising of a new issue of this character, and come to court prepared to meet it. When, therefore, the plaintiff filed an amendment in the midst of the trial, raising a new and important claim of fact going directly to the merits of the controversy, the defendant became entitled to a continuance upon its demand and showing of surprise and want of time in which to prepare to meet the new matter thus injected into the issues. Nor should the court, under such circumstances, hold the party upon whom a new and important issue is sprung at such a late hour to a very strict and formal showing in this respect. If the claim of a desire for time for preparation is made in apparent good faith, and there be nothing in the record to convince the court that the demand is a mere device to cause vexatious delay the burden should be cast upon him who affords the excuse for such demand to show that no injustice will be done by proceeding with the trial. From the very nature of the charge made in the amendment,

the man Zane was the only witness on whom the defendant could rely to meet it, and, as we have seen, the fact that he was out of the State, and beyond the reach of process, was already in evidence before the court. To compel the defendant to proceed with the trial under such circumstances had the effect to place it at an unjust disadvantage, and in our opinion the ruling must be held reversible error.

The point now made by the appellee that the motion was not made in writing does not seem to have been made below. Moreover a motion thus made in the midst of a trial and dictated into the record should, in our opinion, be considered as being in writing, especially where the parties and trial court have recognized it as a motion in the case.

In view of this finding and of the necessity of a new trial, we shall refer to but one other question argued by the counsel. The defense that Brazelton did not truly state the nature and extent of his interest in the insured property is based upon the claim made by defendant that the property was at the date of the policy, and continued until the date of the fire to be, the property of a partnership composed of the said Brazelton and the plaintiff. In support of this defense, the defendant relies upon the testimony given by Brazelton and by Flint as witnesses on the trial, and upon a journal or book of account kept by said parties, the entries in which, according to defendant's theory, tend to show a partnership between them. The court, in submitting this issue to the jury, called attention to the testimony of the two alleged partners, but did not mention the book of accounts, although requested by the defendant to do so. If the attention of the jury was to be specially called to the story told by the witnesses interested in denying the alleged partnership, the request that the court, in the same connection, also, mention the relevancy of the book to the disputed question, ought to have been granted. It is, we

2. INSTRUCTIONS:
recital of
evidence:
omission of
material item.

think, a well-settled rule that, if the court attempts in an instruction to epitomize or collate the various matters of evidence which the jury may take into consideration in the determination of a given question, the omission of any material item bearing thereon constitutes prejudicial error.

Counsel in argument seek to avoid this conclusion by saying that the record presents no evidence of a partnership between Brazelton and the plaintiff at the date of the policy, and therefore the error, if any, was without prejudice. We think otherwise, and, had the jury specially found the existence of the alleged partnership, we would have no hesitation in holding the evidence sufficient to sustain the verdict.

For the reasons stated, a new trial will be ordered. The judgment of the District Court is therefore *reversed*.

H. M. DOOLITTLE, Appellant, v. J. C. MURRAY & Co., J. C. MURRAY, E. T. EDGERLY, J. W. EDGERLY & Co., S. E. MAGNER, I. M. MAGNER, G. W. LOGAN, E. T. DUFUR and RALPH KILGORE, Appellees.

Sales: CONTRACT IN WRITING: VARIANCE BY PAROL. A contract for

- 1 the sale of goods which specifically states the mutual promises and undertakings of the parties, describes the goods sold, the specific sum to be paid, the manner and terms of payment and that the same is to be an absolute sale and transfer of the property, cannot be shown by parol to have been intended as a mere mortgage or conveyance in trust.

Contracts: RATIFICATION: BREACH: DAMAGES. Although one cred-

- 2 itor made an unconditional purchase of his debtor's stock of goods agreeing in consideration therefor to pay other creditors with the balance to himself, and thereafter the debtor had no interest in or control over the same, yet the creditor's act in passing the title to one with whom the debtor had contracted to exchange it for land was a ratification of the act and the creditor was bound by the transaction; and upon his refusal to carry it out the debtor's measure of damages was the amount of the claims which the creditor agreed to pay and

such other damages as resulted from his refusal to accept the land.

Principal and agent: DEFAULT OF PRINCIPAL: LIABILITY OF AGENT.

- 3 One contracting with an agent whose principal is disclosed cannot proceed against the agent to specifically enforce the contract the same as if it were made in his own right, even though the agent may have acted without authority and thereby subjected himself to an action for damages.

Appeal from Wapello District Court.—HON. F. W. EICHELBERGER, Judge.

MONDAY, MAY 20, 1907.

THE opinion states the material facts.—*Reversed.*

Chester W. Whitmore, for appellant.

McNett & McNett, Tisdale & Heindel, and *James G. Bull*, for appellees.

WEAVER, C. J.—The somewhat peculiar complication of issues involved in this appeal can be most readily understood from a recitation of the facts, most of which are admitted, stated in narrative form and chronological order.

For some time prior to September 30, 1903, plaintiff, H. M. Doolittle, was engaged in the retail drug business at the town of Murray, Iowa. He had on hand a stock of goods which he estimated would invoice about \$4,500. The business was unsatisfactory. He had suffered at least two or three losses by fire, his insurance had been canceled, his capital was all invested in the stock, and, as the sales were insufficient to enable him to meet his bills as they fell due, he was anxious to sell the property and business. Among his creditors, and, so far as the record discloses his principal creditors, were J. W. Edgerly & Co., wholesale druggists, at Ottumwa, Iowa, to whom he owed \$591.37, and the Churchill Drug Company of Burlington, Iowa, to whom he owed \$119.68. If there were any other creditors, this

proceeding is not complicated by their appearance or claims. After some correspondence with Edgerly & Co. plaintiff appeared at their store in Ottumwa on September 20, 1903, and negotiations were begun for some satisfactory adjustment of their business. After some discussion E. F. Edgerly, the credit man of the firm, went with plaintiff to consult counsel. At first it was proposed that plaintiff execute a mortgage on his stock, but this plan was rejected as inadmissible; it being thought that plaintiff's title should be entirely divested in order that valid insurance might be procured. It was then agreed that a new firm or partnership should be organized under the name of J. C. Murray & Co., with or through which firm the deal with plaintiff was effected. This firm consisted of J. C. Murray, an employé of Edgerly & Co., and E. F. Edgerly, its credit man above mentioned. For obvious reasons Edgerly & Co. as wholesale druggists, looking to the retail dealers of their territory for patronage, did not wish to appear publicly as themselves owning or conducting a retail business, and to avoid this objection the device of an independent partnership was adopted. A written contract was then entered into between plaintiff and J. C. Murray & Co. in language as follows:

This contract made and entered into by and between H. M. Doolittle, of Murray, Iowa, and J. C. Murray & Co., of Ottumwa, Iowa, this 30th day of September, 1903, witnesseth: That the said Doolittle has this day sold and transferred to said Murray & Co. his certain drug store, located in Dr. J. F. Hasty's building, on the north side of the railroad track on Maple avenue, in Murray, Iowa. The said stock consists of drugs, chemicals, notions, paints, oils, wall paper, patent medicines, cigars, tobacco, and all furniture and fixtures in said building, including soda fountain, show cases, stove, prescription case, and includes all the fixtures not owned by the landlord, J. F. Hasty; and this is to be an absolute sale and transfer, and said Doolittle warrants the title to all of said stock, fixtures, etc., to said Murray & Co., in consideration of which the said Murray & Co. hereby undertakes and agrees to assume and pay a certain bill or claim

of J. W. Edgerly & Co., of Ottumwa, Iowa, against the said Doolittle, for the sum of \$591.37, also the claim of the Churchill Drug Co., of Burlington, Iowa, for the sum of \$119.68; and they further agree that within a reasonable time, and as expeditiously as they can do so in a reasonable way, they will make sale of said entire stock for the best terms and price they can obtain, and that after deducting the amount of the aforesaid assumed bills and all expenses they may have incurred in and about the said stock over and above its net proceeds they will pay as further consideration the said purchase price received by them from the sale of the said goods. That in said expense shall be included all bills made by them in further conducting said business, and said Doolittle hereby transfers his unexpired lease on the premises where his store is located to said Murray & Co., and said Murray & Co. hereby agrees to pay all rents to accrue on the unexpired term. Any rents paid are to be included in the bill of expenses as well as any insurance paid by said Murray & Co. [Signed] H. M. Doolittle, J. C. Murray & Co.

Immediately upon the execution of this instrument one Haslach was employed and authorized to go to the town of Murray, where the goods were, and to take charge and control of the Doolittle stock and business in the name and behalf of Murray & Co., and conduct the same until it could be closed out by sale or other satisfactory disposition of the matter. There was also some talk or understanding between plaintiff and Murray & Co., the terms and extent of which are the subject of dispute, looking to effort on part of plaintiff to find a purchaser or make a sale of the stock. Haslach went to Murray on the same or following day, and Doolittle turned the stock over to him. Haslach applied to local agents for insurance, representing that Murray & Co. were sole owners, and that Doolittle had no interest in the property. On October 3, 1903, Edgerly wrote plaintiff, advising him of the address of certain parties who he said had an equity in farm land which they desired to exchange for the drug stock. On October 5, 1903, plaintiff, purporting

to act as agent for J. C. Murray & Co., entered into a written contract with S. E. Magner to exchange the stock for one hundred and sixty acres of land in Union county, Iowa. The land was priced at \$8,100, which was to be paid by delivery of the drug stock invoiced at cost, and to aggregate not exceeding \$5,000, and by assuming a mortgage incumbrance on the land of \$3,500. Any difference which the invoice might develop in favor of either party was to be paid by the other in cash. This writing was signed by Magner, and by "H. M. Doolittle, Agent for J. C. Murray & Co.," and witnessed by Haslach. On the following day Doolittle wrote Edgerly that he had succeeded in making a trade of the stock for one hundred and sixty-two acres of land at \$50 per acre, and had made application to a loan company to get the money to straighten up with. He then added: "Will you have the deed made to you and take land from you, or will you have the land deeded to myself and deposit deed in bank subject to your order until the land is sold or money raised by mortgage? I believe there can be something more than the purchase price obtained from the land." He swears that he inclosed a copy of the contract in this letter, but Edgerly is unable to recall having seen it until his visit to Murray hereinafter mentioned. To this letter Edgerly replied, saying: "We beg to acknowledge receipt of yours of the 6th advising us of your having made a trade of the J. C. Murray & Co., stock for a farm. We trust the matter may go through without complication. Inasmuch as J. C. Murray & Co. are acting in behalf of others, we think it would be more correct for them to receive the deed of the land, and then deed it back to you as matters are straightened up. We judge you will have to raise somewhere in the neighborhood of \$4,500 in cash to enable you to pay the amount due the other party over and above the value of your stock, and enable you to take up your outstanding accounts." Haslach having first notified Edgerly of the intention to do so, an invoice of the stock was taken

by Haslach, Doolittle, and a party representing Magner. The value of the stock as thus fixed aggregated about \$3,625. At the completion of the invoice Haslach, for some reason not explained, was dissatisfied with the situation of affairs, and sent for Edgerly. On the arrival of the latter in Murray, Haslach informed him of the invoice and its amount, to which Edgerly made no response or objection. Prior to this time Magner and wife had executed a deed for the land to J. C. Murray & Co., and deposited it in a bank at the town of Murray to be delivered on completion of the deal and payment of the cash difference between the agreed price of the land and the invoice of the goods. At this visit, if not before, Edgerly saw the written contract, called at the bank and learned of the deposit of the deed, and seems to have been fully advised of all the steps taken up to that date. He made inquiries as to the location, quality, and value of the land, and with plaintiff went over the figures to ascertain the amount of money required to carry out the deal. They estimated that the aggregate of the mortgage incumbrance with the cash difference and enough to cover the claims assumed for Doolittle would represent an investment of \$30 to \$32 per acre. The date of this visit was not clearly shown, but there is ground for belief that it was not earlier than October 11th nor later than October 15th. Under date of October 10, 1903, Doolittle had written Edgerly that Magner desired a bill of sale of the stock made to E. S. Magner and G. W. Logan at the conclusion of the invoice, and inclosed a blank form for that purpose. He closed by saying: "We have left the amount a blank which you can give me written authority to fill in, the land to be deeded to you as J. C. Murray & Co." On the 12th the bill was acknowledged and signed by J. C. Murray & Co. and returned to Doolittle, with an inquiry whether he had succeeded in making the loan, and saying they would want time to get together an account of the expenses incurred. The invoice having been completed, Doolittle completed and

delivered the bill of sale to Logan and Magner about October 15, 1903, and Haslach delivered to them the possession of the stock. This left nothing to prevent the delivery of the deed to Murray & Co. whenever the cash difference between the properties had been paid. As to what was done by the respective parties during the succeeding period of two months, the abstract contains no satisfactory account.

On December 15, 1903, Edgerly, writing to Doolittle in answer apparently to a letter not contained in the record, said: "Did you see the written opinion of Mr. Davenport as to the title, etc., of the land in question? The point we wished to mention in the letter to you was that we have a report which states that one of the parties with whom we are dealing at one time was indicted by a grand jury for forging deeds. As this transaction is in that same line, we thought it was very important that the title be investigated. Will you let us know whether you have seen Mr. Davenport's written opinion? We will probably not be able to give this matter very close attention until after the first of the year, as we are very busy with closing up details of the year's business. We trust you may make a sale. We suppose that between now and March 1st special efforts should be made, as about March 1st much land changes hands. If nothing is done within the next 30 or 60 days, we will see what we can do." The suggestion in this letter about a sale evidently has reference to a sale of the land, and not of the goods, as the latter had long since passed to Magner and Logan. To this letter plaintiff responded on December 17th that he had seen the abstract of title and Davenport's certificate thereon, and advised Edgerly to list the land with agents in Ottumwa. He then adds: "As the deal stands I have nothing to show an equity in the lands, and believe it no more than right that a note be given by you for say \$800. That would be placing the land at the lowest figure any one would sell it; i. e., \$37.50 per acre. Of course, I will do my part in attempting to make a sale; in fact, I will list it

with three real estate agents in this city [Des Moines] and others nearer the land. This shall be done to-day and the list of them sent you." On the following day Edgerly answered the letter as follows: "Dear Sir: Replying to yours of the 17th, do we understand that in that abstract that Mr. Davenport set forth, or rather, that the abstracter set forth, that there are no liens on the property, except those of which we know? As we have no property as yet to base a note on, we hardly think it would be just to expect us to give one. We think that the terms of the contract which you have with J. C. Murray & Co. are ample protection for you. We will list the property with one or two agents here. We do not know that we have any good description of it, however, and would suggest that you send us one. By description we do not mean the describing it by location, section, etc., but as to the number of acres under cultivation, the nature of the surface, the condition of the buildings, etc. By the way, do you know if the insurance on the buildings has been looked after?"

It would seem that other letters between the parties immediately following the last above quoted are not in evidence. The next shown is from J. C. Murray & Co. to plaintiff, bearing date January 8, 1904, in which they say: "We have yours addressed to E. F. Edgerly, and are looking after this matter. We have taken it up with our attorney. We think it may be necessary for us to view the land personally, or have one with whom we are acquainted inspect it, so we can have a satisfactory idea of its value from our own observation. We are of the opinion that Magner & Co. cannot hold both the stock and the land, though a rather nasty legal complication might come up if anything were attempted by them in that direction. At any rate, we are endeavoring to find out what are the facts in the matter, and will probably write again the first of next week." On January 22d Edgerly, after notifying plaintiff to join him, went to Union county and made a personal examination of

the land. About the same time, and apparently on the same day, Edgerly with his attorney, interviewed Magner to whom the bank had redelivered the deed made to J. C. Murray & Co., and procured his agreement to deposit said deed as an escrow for another period of fourteen days from that date; the delivery to the grantees being conditioned upon the payment by J. C. Murray & Co. to the bank, for Magner, of the sum of \$973.55. There was also further provisions for a reduction from the above amount if a deficit was shown in the acreage of the land; but the details of this item are not material in the present case.

On January 29, 1904, Edgerly wrote to the plaintiff, replying to a letter which is not in the record, and for the first time in the correspondence distinctly repudiated for J. C. Murray & Co., any promise or obligation to put any money into the land, and insisted that, while nominally acting as their agent in the transaction, plaintiff was in fact acting for himself. He also charged plaintiff with misrepresenting the value of his stock and informed him that Edgerly & Co. had not been paid their claim, and would proceed to enforce collection, if payment was not made promptly. On the following day Edgerly addressed Magner, saying: "When Mr. Work and I were at Murray with you about a week ago, there was some talk of possible exchange of farm and stock. If you have any proposition on that line to make, we would suggest that it be made at once so there would be time to consider it, and, if accepted, to carry out any details connected with it." Other letters passed between plaintiff and Edgerly on February 1st and 2nd, which are in effect disclaimers by both parties of any ultimate responsibility for the failure to complete the exchange of properties, and on February 8, 1904, J. C. Murray & Co. closed the correspondence by a letter saying: "We having decided that we could not accept the land on the terms required, inasmuch as we could not furnish the money to put up the bonus, have decided not to take the land, and therefore will

not pay any difference, nor are we in position to pay any jobbing bills of H. M. Doolittle & Co. This we have endeavored to make plain in the past, and is final in our case." Some months later, and before the commencement of this action, plaintiff made a written demand upon J. C. Murray & Co. and Edgerly & Co. for payment to him of the value of the drug stock less the amount of the claims which Murray & Co. had assumed to pay on his account. Murray & Co. have never paid or discharged the claim of J. W. Edgerly & Co., or that of the Churchill Drug Company. Indeed, the last-named creditor having begun proceedings against him to enforce collection, plaintiff has been compelled to discharge this claim himself at an expense of \$149.10.

This action was begun at law August 4, 1904, making J. C. Murray & Co., J. T. Edgerly, J. C. Murray and J. W. Edgerly & Co. defendants to recover damages sustained by the plaintiff on account of the alleged failure of the defendants to perform the written contract first mentioned in the opinion. At an early stage in the proceedings the trial court ordered the plaintiff to implead and serve notice upon the parties claiming or appearing to claim an interest in the land or in the stock of goods exchanged for the land, and set down the issues for trial as in equity. The answer of the original defendants is to the effect that the contract sued upon, while an absolute sale in form, was, in fact, intended as a mortgage or trust agreement by which the legal title to the property was placed in J. C. Murray & Co., to secure the plaintiff's debt owing to J. W. Edgerly & Co., and that no obligation was assumed by J. C. Murray & Co. except to apply whatever they might realize out of the stock, in the manner provided in the contract. They further say that, while nominally acting as their agent in the attempt to dispose of the stock, plaintiff was, in fact, acting for himself, and that he alone is responsible for the losses sustained in that transaction. Magner, Logan, and Dufur appear and in a cross-bill set up the contract for exchange of prop-

erty, say that J. C. Murray & Co. were only nominal parties to said contract, and ask for its specific enforcement against the plaintiff. On trial of the several issues to the court a decree was rendered dismissing the plaintiff's petition as to all the defendants, also dismissing all the cross claims between the defendants, and taxing all costs (\$162.90) to the plaintiff. Upon the cross-bill filed by Magner, Logan, and Dufur personal judgment was rendered in their favor against the plaintiff above for \$1,450.29. It was further provided that, a deed of the land from Magner to plaintiff having been brought into court, the same should be delivered to plaintiff upon payment by him within six months of the date of the aforesaid judgment; but, in case he failed to make such payment within the said period, then a special execution issue for the sale of his interest in the land.

From this decree the plaintiff has appealed.

I. We have first to consider whether it is competent for the defendants Murray & Co. to plead or to prove that the written contract on which this action is based is not a contract of sale, but a mere mortgage or trust agreement for the benefit of certain creditors of the plaintiff; and, if this be answered in the affirmative, is it also competent for said defendants to plead or prove that the written promise of Murray & Co. to assume and pay the claims of Edgerly & Co. and the Churchill Drug Company was subject to a contemporaneous oral agreement that such promise and assumption of responsibility should be interpreted as nothing more than an undertaking to sell the goods, and apply the net proceeds of such sale to the payment of the claims mentioned? Stated in other words, can Murray & Co. be heard to say, "It is true we have undertaken in express written words to pay these claims in consideration of the sale to us of Doolittle's stock of goods, yet, according to our mutual understanding, not reduced to writing, the extent of our obligation was to take the title to said goods in trust

1. SALES: contracts in writing: variance by parol.

and apply the net proceeds of their sale to the satisfaction of these claims"? In attempting to answer these inquiries, it is well to note at the outset that neither party makes any charge or claim of fraud or mistake in the procurement, execution, or delivery of the contract, and neither party is asking for its reformation. The general rule of law which excludes testimony of prior or contemporaneous oral declarations and agreements to vary the terms or legal effect of a written contract is too elementary to permit of argument or citation of authorities. It is also well established that a deed purporting to transfer or convey title to property may be shown by parol to have been given and received as a mortgage whether the action be in equity or at law. *McAnnulty v. Seick*, 59 Iowa, 586; *Frick v. Kabaker*, 116 Iowa, 502. This rule is not altogether an exception engrafted upon the former; because, ordinarily speaking, a deed is not evidence of the contract between the parties, but is rather the consummation of a contract resting in parol or in another writing. *Trayer v. Reeder*, 45 Iowa, 272; *Saville v. Chalmers*, 76 Iowa, 325; *Bever v. Bever*, 144 Ind. 162 (41 N. E. 944); *Davis v. Hopkins*, 32 Pac. 70 (18 Colo. 153). But where any inconsistency is found between the terms of the preliminary contract and the deed which witnesses the consummation of the transaction, the latter will prevail. *Philbrook v. Emswiler*, 92 Ind. 590; *Cole v. Gray*, 139 Ind. 396 (38 N. E. 856).

It may be further conceded that the purpose for which a writing was delivered may generally be shown by parol; but this is subject to the restriction that the purpose thus shown must not be in contradiction of the express terms of such writing. *Courtwright v. Strickler*, 37 Iowa, 382; *Dickson v. Harris*, 60 Iowa, 727; *Blair v. Buttolph*, 72 Iowa, 31; *De Goey v. Van Wyk*, 97 Iowa, 492. These rules have been most frequently applied to conveyances of real estate, but have sometimes been invoked in the consideration of bills of sale of personal property. *Voorhies v. Hennesy*,

7 Wash. 243 (34 Pac. 931); *Seavey v. Walker*, 108 Ind. 78 (9 N. E. 347); *Frick v. Kabaker*, *supra*. But, where the writing is something more than a formal transfer of title, is executed by both parties, and contains mutual stipulations and provisions which they specifically undertake to observe, it is held with very general unanimity that parol evidence is not admissible.

With these general rules in view, let us look now to the terms of the contract in suit. In apt words, it witnesses the sale of plaintiff's stock of goods to Murray & Co., in consideration of which the latter "undertake and agree to assume and pay the bills and claims held against plaintiff by J. W. Edgerly & Co., \$591.37, and the Churchill Drug Co., \$119.68," and further to proceed to a sale of said stock as soon as practicable, and to pay over to plaintiff the net proceeds thereof after deducting the amount of the bills assumed and all expenses incurred in closing out said stock. To allow proof that notwithstanding the express agreements in the writing, plaintiff did not in fact sell the goods, and Murray & Co. did not, in fact, assume any personal obligation to pay what they promised to pay, is to affirm a proposition of law for which we think there exists no authority in principle or precedent. The books are not silent upon this question. For example, it has been held that, where a mortgage secures in express terms the payment of a given sum of money, parol evidence will not be admitted to show that the real purpose of the parties was to secure the performance of an oral agreement. *Adair v. Adair*, 5 Mich. 204 (71 Am. Dec. 779). Nor will such evidence be admitted to show that a mortgage given by an individual was in fact the mortgage of a partnership of which he was a member. *Jones v. Phelps*, 5 Mich. 218. One B. having acknowledged, in writing, the receipt of payment from G. for a private way across his land, it was incompetent for him to show by parol that the grant was understood to be personal only, and subject to revocation by the grantor.

Wetherell v. Brobst, 23 Iowa, 586. Where the parties have in writing declared in clear and unambiguous terms the purpose of their agreement, that declaration cannot be denied or varied by proof of prior or contemporaneous parol agreements. *Crane v. Bayley*, 126 Mich. 323 (85 N. W. 874). In the case of *Marsh v. McNair*, 99 N. Y. 176 (1 N. E. 660), we have a precedent which is in principle quite applicable to the case at bar. There the plaintiffs by a written assignment absolute in form, transferred to one Gibson the title to certain policies of life insurance setting forth in the writing that the consideration for such sale was the agreement by Gibson to pay certain debts owing by plaintiffs to different creditors therein named. Thereafter the plaintiffs brought an action, alleging that the assignment was made as collateral security only, and sought to recover the amount collected on the policy in excess of the debt for which they claimed it had been pledged. The Court of Appeals, after conceding the rule that an ordinary deed or bill of sale may be shown by parol to have been intended as security only, proceeds to say:

So, if this were simply an absolute assignment of the policy to Gibson, there could be no question under the law of this State that the plaintiff could be permitted to show by parol that it was intended as collateral security. But here was more than a simple assignment. . . . By its terms the precise terms upon which the policy was assigned are specified, and that is stated to be that Gibson was to credit Charles H. Marsh with the sum of \$353.72 at his bank, which sum was, in fact, an overdraft by Charles at the bank, and that credit was made. Gibson was also to pay a certain mortgage upon real estate which John R. Marsh had conveyed to him, . . . and he was to indorse \$35.82 upon a note for \$300 which he held against Charles H. . . . This instrument was more than an assignment. It contains what both parties agreed to. It shows that the assignment was made for the purposes mentioned and precisely what Gibson was to do in consideration thereof. He became bound to do precisely what was speci-

fied for him to do, and he could have been sued by the assignors for damages if he had failed to perform. Hence the instrument is not a mere assignment or transfer of the policy. It is a contract in writing within the rule which prohibits parol evidence to explain, vary, or contradict such contracts. . . . It is believed that no case can be found where parol evidence has been received for the purpose of showing that such an instrument was given merely as collateral security, and not for the precise purpose mentioned in it. Without commenting upon the authorities, the following are ample to show that the evidence was not competent.

Citing 1 Greenl. Evidence section 275; *McCrea v. Purmort*, 16 Wend. (N. Y.), 461 (30 Am. Dec. 103); *Kellogg v. Richards*, 14 Wend. (N. Y.), 117; *Goodyear v. Ogden*, 4 Hill. (N. Y.), 104; *Graves v. Friend*, 5 Sandf. (N. Y.), 568; *Coon v. Knap*, 8 N. Y. 402 (59 Am. Dec. 502); *Cocks v. Barker*, 49 N. Y. 107; *Hinckley v. Railroad Co.*, 56 N. Y. 429; *Van Bokkelen v. Taylor*, 62 N. Y. 105; *Shaw v. Ins. Co.*, 69 N. Y. 286; *Wilson v. Deen*, 74 N. Y. 531; *Eighmie v. Taylor*, 98 N. Y. 228. Still closer in point both in fact and in principle is the case of *Thomas v. Scutt*, 127 N. Y. 133 (27 N. E. 961). There the parties entered into a written contract by which Thomas sold and transferred to Scutt a certain raft of hemlock lumber for the agreed price of \$728, the same to be applied in payment of a chattel mortgage held by Thomas on said lumber and other property. Defending against an action brought on this contract, Thomas sought to prove by parol that the real purpose and intention of the parties was that the lumber be turned out to him to secure the repayment of advances made by him to the plaintiff, and that he received the lumber under the express agreement and understanding that he should market the same and account to plaintiff for the proceeds after deducting all expenses and the amount of plaintiff's debt — all of which defendant expressed his willingness to do. Rejecting parol evidence of these alleged facts, and applying to the case the rule affirmed in *Marsh v. McNair*, *supra*, the court says:

The principle upon which parol evidence is held admissible to show that a simple assignment, though absolute in terms, was intended as security merely, is the supposed incompleteness of the instrument, and is not regarded as contradicting the writing but as showing its purpose. *Truscott v. King*, 6 N. Y. 147; *Horn v. Keteltas*, 46 N. Y. 605. Where, however, instead of a mere transfer or assignment, there is a contract appearing on its face to be complete, with mutual obligations to be performed, you can no more add to or contradict its legal effect by parol stipulations preceding or accompanying its execution than you can alter it through the same means in other respects [citing *Phil. Ev.* (2 Cow. & Hill's Notes) 698, and other authorities]. . . . We regard this contract as complete upon its face. What element is wanting? If such a writing can be undermined by parol evidence, what written instrument is safe? How can a man, however prudent, protect himself against perjury, infirmity of memory, or death of witnesses? See, also, *McEnergy v. McEnergy*, 110 Iowa, 725.

The language above quoted is in all respects applicable to the contract now in suit. It is something more than a mere assignment or transfer of title to the stock of goods. It is a complete contract, stating specifically and in detail the mutual promises and undertakings of both vendor and vendee—describes the thing sold and transferred, states the names of the creditors whose claims the vendee agrees to pay, the specific sum to be paid to each, the manner in which the remainder of the purchase price is to be adjusted, and then, as if to foreclose any possible doubt as to the nature of the transaction, the parties insert in the writing these words: "And this is to be an absolute sale and transfer, and said Doolittle warrants the title to all said stock, fixtures, etc., to said Murray & Co." To quote again from the case last cited: "If such a writing can be undermined by parol evidence, what written instrument is safe?"

It is not difficult to justify the rule that a writing which simply transfers the legal title to property may be shown by parol to have been given as a mortgage, because

the proof thus offered does not necessarily contradict the writing. But the defense here asserted is based upon parol proof of contemporary agreements which are wholly inconsistent and irreconcilable with the written stipulations. In writing, the parties say in express terms that the sale is absolute and not a mortgage, and that the vendees in consideration thereof will pay certain specific sums to certain named creditors of the vendor; but as witnesses they claim the right to testify that the sale was not absolute, but a mere method of securing the vendors' debt, and that they did not, in fact, undertake to pay anything except as they might obtain the money by a resale of the goods. Could renunciation and denial of a written contract be more complete? Where the writing does not purport to disclose the whole contract; where it seems not designed as a written statement of an agreement, but merely as an execution of some part or detail of an unexpressed contract; where it purports to state only one side of an agreement merely, and is the act of one of the parties only in the performance of his promise — in these and like cases the exception may properly apply and the oral agreement be shown. But, where the writing covers both sides of the contract, where it contains a definite agreement of bargain and sale, specifying the consideration, describing the subject, setting forth the mutual covenants and undertakings of both parties, such writing must be held to conclusively express their intentions. *Eighmie v. Taylor*, 97 N. Y. 288. Parol evidence is inadmissible to annex to a bill of sale or contract of sale any condition inconsistent with the conditions therein expressed. 17 Cyc. 645; *Davis v. Robinson*, 71 Iowa, 618; *Daly v. Kimball*, 67 Iowa, 132; *Fawcner v. Lew Smith Wall Paper Co.*, 88 Iowa, 169; *McCormick v. Markert*, 107 Iowa, 340; *Neal v. Flint*, 88 Me. 72 (33 Atl. 669); *Whitaker v. Sumner*, 20 Pick. (Mass.), 399; *Stevens v. Wiley*, 165 Mass. 177 (43 N. E. 177). In the last-cited precedent the court says that a conveyance absolute in form of real or personal property

may be shown to have been taken as collateral security, but in the case then under consideration the defendants having given a writing acknowledging the sale to them of certain property, and saying, "We are to credit Stevens \$500 on our account against Stevens & Oldham," it was held not to be open to them to show by parol evidence that the agreement was something else. Authorities to this effect are very numerous and further citation is unnecessary.

Before leaving this topic, we may say that the conclusion that a sale, and not a mortgage was intended by the parties, is strengthened by the testimony of the defendants that mortgage security was at first discussed between them, but was abandoned because they understood that, unless the transfer was absolute, there would be difficulty in getting valid insurance. Hence the contract of sale and the definite expression therein of its absolute character. Had insurance been procured by Murray & Co. and loss incurred, can there be any doubt that said vendees would have insisted upon being considered the owners of the property? That an explicit declaration embodied in the writing declaring the sale to be absolute, and not a mortgage, will estop a party to impeach such declaration by parol proof. See *Burnside v. Terry*, 45 Ga. 621. We are bound to assume in making this declaration the parties were acting in good faith and with no intent to defraud. See, also, as bearing on the general question, *Grabfelder v. Vosburgh*, 85 N. Y. Supp. 633 (90 App. Div. 307); *Bass D. G. Co. v. Mfg. Co.*, 119 Ga. 124 (45 S. E. 980); *Richardson v. McConaughy*, 55 W. Va. 546 (47 S. E. 287); *Forsyth v. Castlen*, 112 Ga. 199 (37 S. E. 485, 81 Am. St. Rep. 28).

It follows from the foregoing that the finding of the trial court that the contract in suit may be treated as a mortgage only, and that appellees' promise to pay may be considered as a mere undertaking to account for moneys acquired by a sale of the property cannot be upheld. For the same reasons which exclude parol proof to convert the

contract in suit into a mortgage, it is likewise incompetent by such proof to show that, instead of a sale according to the expressed terms of the writing, the agreement was one of trust.

II. Having found that the contract in suit must be treated and enforced as a contract of sale according to its terms, we proceed to inquire concerning the rights of parties as affected by their subsequent dealings.

2. CONTRACTS:
ratification:
breach:
damages. Without again rehearsing these transactions, it is entirely clear to us that after the contract of sale was consummated plaintiff retained no authority or control over the goods. The possession of the stock was promptly surrendered to Murray & Co.'s representative. Plaintiff had neither the right nor the power to sell or dispose of said stock or any portion thereof, save as power to do so was given by Murray & Co. His contract with Magner & Logan was of no validity, save as it was ratified by Murray & Co. As under the terms of the sale to Murray & Co. plaintiff was to receive the proceeds of the resale of the stock, he was naturally and properly interested in bringing about such a resale as soon as practicable and on the best obtainable terms, and Murray & Co. were evidently willing to avail themselves of his services in that behalf. It is conceded that at the time, or soon after the contract was made, there was some talk that plaintiff should endeavor to find a customer who would buy the stock or exchange other property therefor. In making the attempted exchange with Magner & Logan, he acted in the name of Murray & Co., who, on being notified thereof, directed him to have the deed to the land made to themselves as grantees, and in furtherance of the deal made and forwarded to him a bill of sale of the stock to be delivered to Magner & Logan. The cash difference which must be paid to consummate the exchange was talked over, and the amount estimated between plaintiff and Edgerly, who represented Murray & Co. When plaintiff distinctly disclosed his claim and asked Mur-

ray & Co. for a note of \$800 for his margin in the transaction, appellees did not deny the relation of principal thus imputed to them, but objected that the trade was not yet consummated, and they had "as yet no property to base a note on." It is, moreover, of much significance that after **Magner** had refused to keep the matter of the conveyance of the land open any longer and had withdrawn his deed from the bank where it had been deposited in escrow, and when all the facts with reference to the proposed exchange were well known, **Edgerly**, for **Murray & Co.**, after visiting and examining the land, went to **Magner** and induced him to redeposit the deed in escrow to be delivered to **J. C. Murray & Co.** upon the payment by them of the sum of \$973.55. A few days later, having concluded not to take up the deed, they wrote plaintiff, saying: "We have decided we could not accept the land on the terms required, inasmuch as we could not furnish money to put up the bonus; have decided not to take the land, and therefore will not pay any difference, nor are we in position to pay any jobbing bills of **H. M. Doolittle & Co.**" Surely in the face of this record it cannot be successfully maintained that no relation of principal and agent existed between **Murray & Co.** and the plaintiff. Such being the relation of the parties with reference to the exchange of the stock for the land, and plaintiff's act in negotiating such exchange having been ratified by **Murray & Co.** to the extent of transferring the title to the stock of goods to **Magner & Logan**, but permitting it to fail by their refusal to take the deed from escrow, we see no escape from the conclusion that the plaintiff is entitled to recover upon his contract.

But such recovery is not to be measured, as his counsel argue, by the value of the stock of goods sold by him. **Murray & Co.**'s undertaking was not to pay the market value of the goods, but to pay the claims of the two creditors named, and as much more, if anything, as might be realized on a sale of the goods after deducting the sum

paid as aforesaid and all expenses incurred. It follows, we think, that plaintiff's recovery will be limited to the amounts which Murray & Co. expressly assumed and agreed to pay, if they have not paid the same, with such other damages, if any, as resulted to him from their refusal to accept the title to the land which was to be taken in exchange for the goods. But, as he himself negotiated the exchange, if he overestimated the value of the land so that, after paying the incumbrance upon it and the cash difference agreed upon, there was no margin of profit in it, or if the margin of profit did not exceed the amount of the debts assumed by Murray & Co. and their expenses reasonably incurred in the transaction, then plaintiff suffered no recoverable damage because of their refusal to complete the exchange. If, on the other hand, the reasonable market value of the land was in excess of the incumbrance upon it, added to the cash difference agreed upon and the amount of the indebtedness assumed by Murray & Co. and their proper expenses as aforesaid, plaintiff's recovery will be increased by the excess thus ascertained.

The testimony in the record is not such as to enable us to pass upon these questions of fact, and the cause must be remanded for their determination. We may properly say at this point that one of the contentions of the appellant is that the court below erred in transferring the cause from law to equity for trial. Assuming that the order was properly made, the conclusions we have announced serve to eliminate the issues of an equitable nature, and in our judgment the issues remanded for further hearing are triable by ordinary proceedings if either party shall demand it.

III. As a necessary consequence of the conclusions already announced, the decree of the trial court upon the cross-bill in favor of Magner, Logan and Dufur must be reversed. Even had we reached the opposite conclusion as to the controversy between plaintiff and Murray & Co., we think

3. PRINCIPAL
AND AGENT:
default of
principal;
liability of
agent.

this decree could not be approved. The cross-petitioners dealt with plaintiff as an agent only. The name of his principal was disclosed, and even if he acted without due authority and thereby exposed himself to an action for damages, we think there is no rule of the law of agency which enables them to treat him as a principal and specifically enforce the contract against him as if it were made by him in his own right. What may be the rights of the several appellees as between themselves we have no occasion to consider or determine.

The decree of the district court is reversed, and cause remanded for further proceedings not inconsistent with this opinion.— *Reversed.*

A. B. JUDSON ET AL., Appellants, v. B. T. AGAN, County Auditor, Appellee.

Injunction: APPORTIONMENT OF SCHOOL FUNDS. The courts will not enjoin a county auditor, in an action brought against him only, from making an apportionment of school taxes based on the pupilage reported by the county superintendent; since in so doing he is performing a purely ministerial duty commanded by the statute.

Appeal from Mills District Court.—HON. O. D. WHEELER, Judge.

MONDAY, MAY 20, 1907.

ACTION in equity for an injunction. A demurrer to the petition was sustained, and the plaintiffs appeal.— *Affirmed.*

E. A. Cook and H. J. Baird, for appellants.

Jno. Y. Stone and E. B. Woodruff, for appellee.

Taxation: OPTION CONTRACT FOR SALE OF LAND. A contract granting a mere option to purchase land in the future on specified terms is not taxable against the grantors as a credit.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

MONDAY, MAY 20, 1907.

ACTING on the assumption that Shields Bros. were the owners as of date January 1, 1903, of a credit item consisting of a land contract, so called, in the amount and value of the sum of \$9,650, which credit item had been withheld from assessment and taxation, the treasurer of Pottawattamie county entered on his books an assessment against said firm in said sum. An appeal to the district court resulted in an affirmance of the assessment, and this appeal followed.—*Reversed.*

H. L. Robertson, for appellant.

John J. Hess, for appellee.

BISHOP, J.—The land contract in question was entered into on June 23, 1902, and was a contract for the sale of a farm situated in Pottawattamie county by Shields Bros. to one J. A. Flynn. It was recited in the contract writing that the said Shields Bros. “hereby agree to sell to the second party on the performance of the agreements of the second party as hereinafter mentioned,” etc.; further, that said Flynn, “in consideration of the premises hereby agrees to purchase . . . the real estate above described for the sum of \$10,150. and to pay said sum therefor to the first party as follows: \$500. on the execution of this agreement, \$9,650. in three payments, to wit: First payment, March 1, 1903, \$1,500.; second payment, a note for \$1,500., due May 15, 1903, interest from March 1, 1903; third payment, balance of \$6,650. . . . a mortgage on the above

described premises running five years from March 1, 1903, with interest. . . . Deed to be delivered and possession given March 1, 1903. And the first party [Shields Bros.] shall pay all taxes . . . on said property . . . for the year 1902." It is then recited that, if default shall be made in payment, "in consideration of the damage, injury, and expense thereby resulting . . . this agreement shall be void and of no effect, and the second party shall have no claim in law nor equity against the first party, nor to the above mentioned real estate; and any claim, or interest or right the second party may have hereunder . . . or any payments made hereunder, shall on such default cease and determine and become forfeited without any declaration or act of the first party. . . . But if said sums of money and interest are paid as aforesaid . . . the first party will . . . execute and deliver a warranty deed to said premises as above agreed."

Shields Bros. appeared before the treasurer pursuant to notice, and, in writing, objected to an assessment on the grounds, first, that the contract between the parties, as evi-

1. CONTRACTS:
variance of
writing by
parol.

denced by the writing and by the facts and circumstances attending the making thereof, was not intended or understood to be a contract of sale, or one creating an absolute indebtedness; that, on the contrary, it was a mere option, giving Flynn the right to purchase in the future on the terms and conditions specified, and that it was so intended and understood by the parties thereto; second, that an assessment based on said contract as an item of credit would result in double taxation. And it was upon the issues as thus outlined that the case was tried below and is now presented in this court. The hearing was had in the district court as in equity, and on such hearing the appellants brought into the record proof of the circumstances attending the making of the contract. Each of the respective parties to such contract were called to the stand, and, over objections as to competency, etc.,

testified that it was their understanding that a mere option to purchase was all that was in contemplation and being granted; that they informed the scrivener that such was their contract, and supposed he had so written. A contract rests in the intention of the parties thereto. It is true by general rule that, where the contract has been committed to writing, the nature and extent of the undertakings must be ascertained by an inspection of such writing. Oral evidence is not allowable to work a change or variance in the terms, conditions, etc., as fairly expressed by the writing. But this rule is enforced only where a controversy arises between the parties to the contract or their privies. As against a stranger to the contract, a party thereto may assert that the agreement was other or different — in any respect and to any extent — than that which the writing imports. *Livingston v. Stevens*, 122 Iowa, 63; *Logan v. Miller*, 106 Iowa, 511; *Roberts v. Bank*, 8 N. D. 474 (79 N. W. 997); 11 Am. & Eng. Ency. 548, note; Page on Contracts, section 1196 *et seq.*

Now, it may be doubted if the writing here in question imports a sale. In terms the agreement is for a sale — not an agreement of sale. There was to be no change in

possession in virtue of the contract, and the appellants were to pay the taxes on the lands for the current year. Moreover, if Flynn failed to present himself on March 1st following, and make payment, etc., the money paid as of the date of the contract was to be regarded as forfeited, and all his rights should at once, and without action on the part of appellants, cease and determine. But, however this may be, we must treat the contract as one granting only the right to exercise an option. The parties to it so intended and understood; and, as we have seen, all other parties are concluded from asserting that it was other or different. And as against a stranger it is not necessary that the writing be reformed in an action brought for that purpose before the real contract can be

2. TAXATION:
option contract
for sale of
land.

asserted and made the basis of a recovery or defense. *Logan v. Miller, supra*. Now, an option is not a contract to pay. It creates no enforceable indebtedness on the part of the person to whom it is granted. *Hopwood v. McCausland*, 120 Iowa 218; Warvelle on Vendors, section 125. And, this being true, there cannot arise out of such a contract a taxable credit within the meaning of the tax laws of the State.

We conclude that the court below was in error in sustaining the assessment as made by the county treasurer, and accordingly the judgment appealed from must be, and it is, *reversed*.

C. RANCK, Appellee, v. THE CITY OF CEDAR RAPIDS,
Appellant.

134	563
137	446

Eminent domain: ELEMENTS OF DAMAGE: EVIDENCE. In a proceeding to condemn property the measure of damages is the value of the property as it stood at the time of the appropriation; but this rule permits proof of all the varied elements of value which would properly and naturally be taken into consideration by the owner and a purchaser of ordinary prudence desiring the property.

Same. The owner of property sought to be condemned may show its value for a special use for which it has been fitted, and that a particular line of business has been conducted therein for a long time, thus giving an increased value to the location.

Same. Evidence of a general advance in price of property at the date of the condemnation in the immediate neighborhood of that sought to be condemned, although attributable to the very public improvement for the use of which the condemnation is being made, is admissible on the question of the owner's damage.

DEEMER and LADD, JJ., dissenting.

Same. To admit evidence of sales of other property as bearing on the value of that sought to be condemned there must be a showing of similarity of character and situation, or, if dissimilar, the difference should be made to appear that the jury

may make proper allowance therefor in its consideration of the case.

Instructions: REFUSAL. A requested instruction supported neither 5 by the pleadings nor evidence should be refused.

Appeal from Linn District Court.—HON. W. G. THOMPSON,
Judge.

MONDAY, MAY 20, 1907.

THE opinion states the case.—*Affirmed.*

Deacon & Good and *H. E. Spangler*, for appellant.

Jamison & Smyth and *S. K. Tracy*, for appellee.

WEAVER, J.—On April 6, 1905, the plaintiff was, and for some years had been, the owner of a lot bordering upon the west shore of the Cedar river, in the city of Cedar Rapids. About this date the city instituted proceedings to condemn the entire lot for public use as a street and landing for a new bridge to be thrown across the river at that point. The sheriff's jury having assessed the plaintiff's damages at \$7,500, he appealed from said award to the district court, where a verdict was returned in his favor for \$11,000. A motion for new trial was overruled, and judgment rendered in plaintiff's favor for costs and attorney's fees. The defendant appeals.

As the city seeks to appropriate the entire lot, it is conceded that the one question to be determined by these proceedings is the fair market value of the property so taken, and exceptions argued by counsel go to the correctness of the rulings of the trial court upon the admission of testimony and of certain instructions given to the jury.

I. Several witnesses on part of plaintiff were asked and permitted to testify as to the value of the improvements on the lot and the value of the lot with and without the improvements. Plaintiff was also allowed to show that he

had fitted up a livery stable and undertaking rooms on the property, and had carried on such business there for a long time, and that the situation was well adapted to and valuable for these

1. EMINENT
DOMAIN: ele-
ments of
damage:
evidence.

purposes. It is the contention of the appellant that the true measure of damages was the value of the property as a whole in its condition as it stood at the date of the condemnation, and that the inquiry into the details here referred to tended to confuse the jury concerning this rule and unduly enhance the plaintiff's recovery. It is true that the defendant's liability is to be measured by the value of the property as it stood at the date of its appropriation; but it does not follow from this proposition that evidence of the kind here in question is not material and competent to aid the jury in finding what in fact that value was. On the contrary, while there is some confusion in the holdings of the courts along this line, it seems to be fairly well established that proof of such facts is admissible — not as affording a measure of recovery, but as tending to disclose the real character and condition of the property — and support the estimates of value given by the witnesses. Generally speaking, the true rule seems to be to permit the proof of all the varied elements of value; that is, all the facts which the owner would properly and naturally press upon the attention of a buyer to whom he is negotiating a sale and all other facts which would naturally influence a person of ordinary prudence desiring to purchase. *Spring V. W. Co. v. Drinkhouse*, 92 Cal. 528 (28 Pac. 681); *Snouffer v. Railroad Co.*, 105 Iowa, 682; *Railroad Co. v. Woodruff*, 49 Ark. 381 (5 S. W. 792, 4 Am. St. Rep. 51); *Railroad Co. v. Braham*, 79 Pa. 447; Lewis on Eminent Domain, sections 408, 478; *Johnson v. Railroad Co.*, 111 Ill. 414; *Railroad Co. v. Gearhart*, 81 Pa. 260.

In this estimation the owner is entitled to have the jury informed of all the capabilities of the property, as to the business or use, if any, to which it has been devoted, and

of any and every use to which it may reasonably be adapted or applied. And this rule includes the adaptation and value of the property for any legitimate purpose or business, even though it has never been so used, and the owner has no present intention to devote it to such use. *Railroad Co. v. Ryan*, 64 Miss. 399 (8 South. 173); *Johnson v. Railroad Co.*, 111 Ill. 414; *Railroad Co. v. Bishop*, 119 Ill. 525 (10 N. E. 372); *Broom Co. v. Patterson*, 98 U. S. 403 (25 L. Ed. 206); *Cochrane v. Com.*, 175 Mass. 299 (56 N. E. 610, 78 Am. St. Rep. 491); *Sherman v. Railroad Co.*, 30 Minn. 229 (15 N. W. 239). To this end it has been held proper for the owner to prove the presence and value of undeveloped mineral deposits in the land taken, *Doud v. Railroad Co.*, 76 Iowa, 438; *Railroad Co. v. Forbis*, 15 Mont. 452 (39 Pac. 571, 48 Am. St. Rep. 692); *Haslan v. Railroad Co.*, 64 Ill. 353; *Cameron v. Railroad Co.*, 51 Minn. 160 (53 N. W. 199); *Seattle v. Roeder*, 30 Wash. 244 (70 Pac. 498, 94 Am. St. Rep. 864); the cost and value of the house and other improvements on the premises, *Railroad Co. v. White*, 28 Neb. 166 (44 N. W. 95); *Briggs v. Railroad Co.*, 56 Kan. 526 (43 Pac. 1131); *Van Husen v. Railroad Co.*, 118 Iowa, 366; *Haggard v. District*, 113 Iowa, 486; *Orleans R. Co. v. Jefferson R. Co.*, 51 La. Ann. 1605 (26 South. 278); *Railroad Co. v. Hock*, 118 Ill. 587 (9 N. E. 205); *Warden v. Phila.*, 167 Pa. 523 (31 Atl. 928); *Dupuis v. Railroad Co.*, 115 Ill. 97 (3 N. E. 720); *Beale v. Boston*, 166 Mass. 53 (43 N. E. 1029); *Maynard v. Northampton*, 157 Mass. 218 (31 N. E. 1062); *Colusa v. Hudson*, 85 Cal. 633 (24 Pac. 791); *Grand Rapids & I. R. Co. v. Weiden*, 70 Mich. 395 (38 N. W. 294); *Plank Road v. Thomas*, 20 Pa. 91; *Railroad Co. v. Trimmer* (31 Atl. 310); the cost of a well on the premises, *Foote v. Railroad Co.*, 11 Ohio C. D. 685, (Id. 21 Ohio Cir. Ct. Rep. 319); the value of a salt well, though not being utilized, *Kossler v. Railroad Co.*, 208 Pa. 50 (57 Atl. 66); the value of trees growing on the land, *Adkins v. Smith*, 94 Iowa, 758; *Walker v. Sedalia*,

74 Mo. App. 70; *Parks v. Railroad Co.*, 33 Wis. 413; the value of growing crops lost by the condemnation, *Lance v. Railroad Co.*, 57 Iowa, 636; *Gilmore v. Railroad Co.*, 104 Pa. 275; *Railroad Co. v. Scheike*, 3 Wash. 625 (29 Pac. 217, 30 Pac. 503); *Haislip v. R. R. Co.*, 102 N. C. 376 (8 S. E. 926); the kind and value of crops produced in other years, *Hosmer v. Warner*, 81 Mass. 46; the income which might be derived from the property, *Weyer v. Railroad Co.*, 68 Wis. 180 (31 N. W. 710); *Sanitary Dist. v. Loughran*, 160 Ill. 362 (43 N. E. 359); and the fact that the owner has an established and lucrative business on the premises, *Kennebec W. District v. Waterville*, 97 Me. 185 (54 Atl. 6, 60 L. R. A. 856); *Grand Rapids R. Co. v. Weiden*, 70 Mich. 390 (38 N. W. 294); *Covington T. Co. v. Piel*, 87 Ky. 267 (8 S. W. 449); *Dupuis v. Railroad Co.*, 115 Ill. 97 (3 N. E. 720); *Railroad Co. v. Johnson*, 24 Neb. 707 (40 N. W. 134); *King v. Railroad Co.*, 32 Minn. 224 (20 N. W. 135). The price paid for the property has been held a pertinent fact for the consideration of the jury. *City v. Kimbrough*, 59 Tenn. 133; 10 Am. & Eng. Ency. Law (2d Ed.) 1155; *Whipple v. Walpole*, 10 N. H. 130; Mills on Eminent Domain, section 168; Lewis on Eminent Domain, section 444; *Thompson v. Anderson*, 94 Iowa, 554. Concerning evidence of cost of improvements as affecting estimates of value of property of the kind we are here considering, see *Faust v. Hosford*, 119 Iowa, 104; *Richmond v. R. R. Co.*, 40 Iowa, 264. In some cases the loss and inconvenience which must be incurred by the interruption of business or its enforced removal to another location have been recognized as material facts bearing upon the value of the property. *Railroad Co. v. Chamblin*, 100 Va. 401 (41 S. E. 750); *Railroad Co. v. Capps*, 67 Ill. 607; *Railroad Co. v. Hock*, 118 Ill. 587 (9 N. E. 205); *Railroad Co. v. Weiden*, 70 Mich. 390 (38 N. W. 294); *Commissioners v. Moesta*, 91 Mich. 149 (51 N. W. 903); *Ehret v. Railroad Co.*, 151 Pa. 158 (24 Atl. 1068); *Railroad Co. v. Getz*, 113 Pa. 214 (6 Atl.

356); *Seattle v. Roeder*, 30 Wash. 244 (70 Pac. 498, 94 Am. St. Rep. 864); *Patterson v. Boston*, 20 Pick. (Mass.), 159, (Id., 23 Pick. 425; *Jubb v. Hall-Dock*, 9 Q. B. 443; *Railroad Co. v. Heisel*, 47 Mich. 393 (11 N. W. 212); *Railroad Co. v. Siegel*, 161 Ill. 638 (44 N. E. 276).

The cases we have thus far cited may not all be of controlling authority in this State but they serve well to illustrate the marked tendency of the courts to liberality in the admission of proof of any and all facts having any legitimate tendency to aid the jury in arriving at the value of the property appropriated under power of eminent domain. The fact that the owner is denied the ordinary right to refuse to sell his property, except at his own price and on his own terms, affords no reason for awarding him more than a just compensation; but it does afford good reason why he should be given every opportunity to disclose to the jury the real character of the property — its location; its surroundings; its use; its improvements, if any, and their age, condition, and quality; its adaptability to any special use or purpose; its productiveness and rental value; and, in short, everything which affects its salability and value as between buyers and sellers generally. Though acting under legal compulsion, the owner stands in some degree in the attitude of a seller of property, the price of which is to be fixed and settled by the jury, and, so far as he can do so within the bounds of truth and fairness, he is entitled to display all the attractive and desirable features of such property which may tend to enhance its value in the market, and thus secure the highest obtainable compensation therefor.

The party condemning has, of course, the correlative right to rebut the showing thus made by disputing its truth and by proof of other facts which affect the value of the property unfavorably. It is true that market value and intrinsic value are not necessary equivalents, but proof of the latter is often competent evidence for consideration in determining the former. *Railroad Co. v. Braham*, 79 Pa.

447. For instance, if the property condemned has upon it a large business block, it would certainly be material to know whether the building is of steel frame and fireproof construction, or is a cheap veneered wooden frame; and the amount and value of the steel, in the one case, and of the cheaper material in the other, would be an important factor in the judgment of any fair-minded witness or juror in making an estimate of the value of the property as an entirety. That is, these items are not to be considered as in themselves affording a basis or measure of recovery, but as explaining and supporting the estimates made of the value of the property as it stands. As said by us in *Snouffer v. Railroad*, 105 Iowa, 681: "It is right for the jury to consider every fact which tends to give value to the property on the day it is taken." In *Pingery v. Railroad Co.*, 78 Iowa, 442, we also said: "The plaintiff in making his proofs is not confined to mere expert testimony as to the values before and after location, but he may put the jury in possession of such facts as will enable it to make a legitimate estimate of damage therefrom." Speaking to the same point made by the appellant in the present case, the Supreme Court of Washington says that, while the value of the improvements upon or products of the land condemned are not to be considered as a measure of recovery, yet "the value and extent and quality of the stone or the buildings or the lumber, as it exists on the land, may be considered." Lewis on Eminent Domain, section 486; *Seattle Railway Co. v. Roeder*, 30 Wash. 244 (70 Pac. 498, 94 Am. St. Rep. 864). "In arriving at the value of the property taken, a wide range of evidence is admissible." *Railroad Co. v. Brown*, 15 Colo. 196 (25 Pac. 87). "Any existing facts which enter into the value of the land in public and general estimation, and tending to influence the minds of sellers and buyers, may be considered." *Russell v. Railroad Co.*, 33 Minn. 210 (22 N. W. 379). The estimate of value "includes every element of usefulness and advantage in the

property. . . . In determining market value, everything which enhances or depreciates its worth should be taken into consideration." *Alloway v. Nashville*, 88 Tenn. 510 (13 S. W. 123, 8 L. R. A. 123).

How much latitude is to be allowed in bringing out testimony of collateral facts in support of estimates of value by witnesses "is a matter which must be left very largely to the discretion of the presiding judge. We would not undertake to fix the limits of a discretion so necessary to be exercised." *Railroad Co. v. Woodruff*, 49 Ark. 381 (5 S. W. 792, 4 Am. St. Rep. 51). In our judgment the great weight of authority sustains the ruling of the trial court in admitting the evidence here objected to by the appellant and the ruling to which exception is taken involves no error. Nor is there anything in this conclusion which is out of harmony with *Everett v. Railroad Co.*, 59 Iowa, 243, on which the appellant relies. In that case the property owner sought to show by a witness how many town lots could be platted upon the land in question, and, if so laid off, "what the lots would probably sell for in the market," and answer to this interrogatory was excluded. What lots would probably sell for if the land were platted was merely a speculative matter into which the court would not stop to inquire. Had the owner there shown that his land was of such character and location as to afford favorable opportunity for platting a town site or for being divided into smaller lots on which to erect suburban residences, and that such fact gave to his property as it stood a greater value than it would command for purely agricultural use, then, under the rule here approved, the evidence would certainly have been admissible; but no such case was made. *Alexian v. Oshkosh*, 95 Wis. 221 (70 N. W. 162); *Warden v. Philadelphia*, 167 Pa. 523 (31 Atl. 928); *R. & T. Co. v. Kerth*, 130 Ind. 314 (30 N. E. 298); *Railroad Co. v. Beeson*, 36 Neb. 361 (54 N. W. 557); *Railroad Co. v. Longworth*, 30 Ohio St. 108.

II. It is claimed upon part of the appellant that ap-

pellee was permitted to testify to the loss of or injury to his business by reason of the condemnation, and that such evidence is inadmissible. If the record bore out this claim, it would present a very serious question, for the rule observed by the courts with respect to damages of this nature is involved in considerable doubt; but we need not pause to consider it here, because an examination of the abstracts does not sustain the alleged error.

Appellee, as a witness, did testify that he had a stable on the lot fitted up for a large number of horses, and was conducting a livery and feed business there, that such business had been conducted in the same place

2. SAME.

for sixteen years, and that the long use of the premises for such purpose tended to increase their value for such business; but in this there was no error, for all these matters were relevant and material upon the question of the value of the property as indicated in the preceding paragraph of this opinion. No question was asked, and no answer given, as to the injury resulting to the business. The value of the property for any special use for which it is fitted or adapted may always be inquired into, and the fact that for a long time a particular line of business has been there carried on, thus giving an increased value to the location, may also be shown. Of the many authorities already cited supporting this view, none are more directly in point than *King v. Railroad Co.*, 32 Minn. 224 (20 N. W. 135). From this opinion prepared by Mitchell, J., a jurist of distinguished ability, we quote:

We think it elementary that a person is entitled to the fair value of his property for any use to which it is adapted. . . . It is, we think, equally true that any fact is proper to be considered which legitimately bears upon the market value of the property. In this case evidence was introduced tending to prove that the fact of a business having been established and carried on upon the premises for so long a time materially increased the market value of this property. If

this was a fact, it was competent to prove it; and, if proved, we cannot see why it was not proper to be taken into consideration in estimating the value. . . . The owner has the right to its value for the use for which it would bring the most in the market. The property was expressly built for a plow factory, and was especially fitted for such a use, and it is not unreasonable to suppose that a purchaser would give more for it than he would if the business had been suspended for some time, or had never been established there. Take, for example, a hotel built expressly as a public house, and not capable of advantageous use for anything else. Might it not be worth more—that is, bring more in the market—by reason of the fact that it had for years been run as a hotel? . . . If so, why is it not a proper element to take into account in determining its value? To do so is not, as counsel seem to argue, to pay the owner for his loss of business or future profits, but simply to give him the marketable value of his property for the use for which it is best adapted and for which it would bring the most.

This doctrine is in entire harmony with our own decisions. It is also sound in principle, and fully justifies the rulings of the trial court to which the exceptions here considered were taken.

III. A witness on the part of the appellee was permitted to testify that the fact that a bridge was to be constructed across the river had the effect to increase the market value of real estate generally in the neighborhood embracing the property in question, and upon this ruling error is assigned. If we were to concede the objection to be well taken, it is probable that the error was cured by subsequent rulings and instructions of the court; but we are disposed to hold the evidence admissible. It is true, of course, that the necessity or convenience of the party condemning the property must not be considered for the purpose of exacting payment of more than its fair value; but the convenience and availability of such property for use as a bridge landing is a material consideration in fixing its value, as is, also, any general advance of real

estate values in that neighborhood without regard to the cause which produced it; and this is true even if the general advance is attributable to the very improvement for the use of which the condemnation of a particular lot is being made. *Snouffer v. Railroad Co.*, 105 Iowa, 681; *Newgass v. Railroad Co.*, 54 Ark. 140 (15 S. W. 188); *Aspinwall v. Railroad Co.*, 41 Wis. 474; *Boom Co. v. Patterson*, 98 U. S. 403 (25 L. Ed. 206); *Railroad Co. v. Woodruff*, 49 Ark. 381 (5 S. W. 792, 4 Am. St. Rep. 51); *Morin v. Railroad Co.*, 30 Minn. 100 (14 N. W. 460); *R. R. Co. v. Brugger*, 24 Tex. Civ. App. 367 (59 S. W. 556); *Allen v. R. R. Co.*, (Tex. Civ. App.), 25 S. W. 826; *In re State House*, 19 R. I. 382 (33 Atl. 523); *Harrison v. Young*, 9 Ga. 364; *San Diego T. L. Co. v. Neale*, 78 Cal. 63 (20 Pac. 372, 3 L. R. A. 83); *Cohen v. Railroad Co.*, 34 Kan. 158 (8 Pac. 138, 55 Am. Rep. 242); *Currie v. Railroad Co.*, 52 N. J. Law, 381 (20 Atl. 56, 19 Am. St. Rep. 452); *In re N. Y. L. R. Co.*, 27 Hun. (N. Y.), 116; *In re Gilroy*, 85 Hun. 424 (32 N. Y. Supp. 891). The *Snouffer case*, *supra*, is directly in point. True, plaintiff is confined to the value of the property at the time of the taking; but the amount of his recovery is not to be reduced or diminished simply because such present market value may have been strengthened or enhanced by the prospect of the improvement for which the condemnation is made.

IV. One Anderson, a real estate agent, testifying for the appellant having given his estimate of the value of the property, was asked, "Have you known of, and have you made, any sales in that vicinity?" and upon

4. SAME. objection by the appellee the answer was excluded. While the court might well have admitted the answer as bearing upon the qualification of the witness as an expert, there was no prejudicial error in its exclusion. The witness had already shown himself qualified to testify as to values, and the question was asked evidently as preliminary to the proof of prices for which other property in that vi-

cinity had been sold. There was no offer to show the relative situation of the lots so sold with reference to appellee's property, or similarity of the improvements thereon, or even that they were upon the same street, or the date of such sales. There is some general language made use of in *Cherokee v. Town Lot Company*, 52 Iowa, 281, which tends to support the contention of counsel that this testimony should have been admitted. It will be noted, however, on page 283 of the case last above cited, that, upon rehearing being granted, this language was modified, and the general rule affirmed that in order to admit such testimony similarity of character and situation must be shown, or, if dissimilar, the difference should be so made to appear as to enable the jury to make proper allowance therefor in its consideration of the case. See, also, as affirming the inadmissibility of this class of testimony in the absence of such preliminary showing, *Lewis on Eminent Domain*, section 444; *Peoria G. L. Co. v. Railroad Co.*, 146 Ill. 372 (34 N. E. 550, 21 L. R. A. 373); *Lanquist v. Chicago*, 200 Ill. 69 (65 N. E. 681); *Simons v. Railroad Co.*, 128 Iowa, 150; *King v. Railroad Co.*, 34 Iowa, 461; *Cummins v. Railroad Co.*, 63 Iowa, 404.

V. Error is assigned upon the refusal of a request by appellant to instruct the jury that nothing should be allowed to the appellee for injury to his business. As no claim was made for damages for injury to business, and no evidence offered in support of such a claim, the request was properly refused. The jury were properly instructed as to the measure of damages and in substantial accord with the rules of law contended for by appellant. As usual in this class of cases, the witnesses testifying on the trial differ very widely in their estimates of the value of the property in controversy; but there is ample evidence to support the verdict. The jurors were also residents of the county, and are presumed to have been fairly well qualified to judge for themselves upon matters involving the values of real estate in that jurisdiction, and

5. INSTRUCTIONS:
refusal.

therefore qualified to weigh and give proper consideration to the evidence produced in their presence. We cannot interfere with their finding.

The judgment of the district court is therefore *affirmed*.

DEEMER, J. (dissenting).—Plaintiff's entire lot was taken, and here is permitted to show the enhanced value to other property near his lot in virtue of the location of the bridge to enhance the value of the lot taken for the very improvement which it is said would add to the value of other property in that vicinity. I do not think this testimony was admissible. Many cases might be cited in support of this view, but I need not take the time to set them out. It is the value at the time of taking, and not the value after the improvement is made, which should be considered. Surely the city should not be held to pay an increased value by reason of the supposed advancement in values to other property because of the location of the bridge. There were other rulings which I think were erroneous.

LADD, J.—I concur in the dissent.

ANNIE VAN NORMAN, Appellant, v. MODERN BROTHERHOOD
OF AMERICA.

134	575
2143	538

Beneficial insurance: FORM OF ACTION BY BENEFICIARY. The beneficiary in a mutual benefit certificate is entitled to prosecute his action at law for the amount due, rather than in equity, to compel the association to levy an assessment to meet the death loss of the member, where it is provided by the certificate and by laws that the association shall pay all death losses from a fund to be raised by assessments made at the discretion of the board of directors, and the petition alleges that the society has on hand in such fund a sum largely in excess of the amount required to pay the certificate.

Actions: TRANSFER TO EQUITY: PREJUDICE. Where the issues are triable at law and the evidence is in such conflict as to require their submission to a jury, error in transferring the cause to the equity calendar for trial is prejudicial.

Appeal from Linn District Court.—HONS. B. H. MILLER and J. H. PRESTON, Judges.

MONDAY, MAY 20, 1907.

ACTION brought at law by the beneficiary in a mutual benefit certificate issued by defendant, to recover the amount provided by the certificate to be paid on the death of the member. On motion of defendant, the case was transferred to the equity docket, and on the evidence introduced under the issue raised by defendant's answer as to whether the insured died by suicide, within the terms of an exception contained in the certificate, there was a judgment for the defendant. Plaintiff appeals.—*Reversed.*

Voris & Haas, for appellant.

Grimm, Trewin & Moffit, for appellee.

McCLAIN, J.—I. The first contention for appellant is that the action of the trial court in transferring the case to the equity docket, to which exception was properly taken, was erroneous. The provision of the certificate, set out as an exhibit to plaintiff's petition, is that said certificate entitles the person named to membership in the fraternity, and, "in case of the death of the said member while in good standing, permits his beneficiary to participate in the mortuary fund to the amount of one full assessment on all members in good standing in the fraternity, not to exceed two thousand dollars, which shall be paid to" the beneficiary named, who is the plaintiff in this action. And in the by-laws, portions of which are also set out by way of exhibit, it is provided that

1. BENEFICIAL
INSURANCE:
form of
action by
beneficiary.

was erroneous. The provision of the certificate, set out as an exhibit to plaintiff's petition, is that said certificate entitles the person

the Supreme Lodge shall by and through its Board of Directors assess and collect from every member of the fraternity such sums as are fixed by the table of rates provided in said by-laws, "to pay benefits upon the certificates of deceased and disabled members"; and, further, that the board of directors may in its discretion set aside and use for field work and field expenses not to exceed 75 per cent. of the amount of the first twelve assessments paid by all new members, with the provision that no part of the said 75 per cent. shall be so used in any month until the death losses for that month have been paid or proper provision made for their payment. There are further provisions in the by-laws for the making of assessments by the Supreme Lodge, whenever in the judgment of the Board of Directors the condition of the Supreme Lodge requires an assessment to be made, which assessments are to be forwarded to the Supreme Lodge for the benefit fund; and that after proofs of death have been received by the Board of Directors, and claims allowed, an order shall be drawn as soon as the funds on hand will justify for the amount due on such certificates. The allegations of the petition with reference to the defendant's mortuary fund are that such fund is always on hand for the purpose of paying death losses, the same being provided by advance assessments and assessments to be called from time to time when said fund becomes depleted or insufficient to pay death losses as proven; that one full assessment on all members in good standing in the defendant association was at the date of the death of the member named in this certificate a sum largely in excess of the sum to be paid upon said certificate; and that the said sum of \$2,000 to be paid had already been collected and was in the possession of the defendant.

Under these allegations in the petition, we are clearly of the opinion that the plaintiff was entitled to maintain an action at law and recover judgment, on proof of a loss within the terms of the certificate, and should not have been required to proceed in equity for the enforcement of an assess-

duties of constable are to be taken into account in determining his compensation as sheriff; and, second, whether the settlement under which the money was paid to him in the adjustment of his claim for compensation is conclusive.

I. In Code Supp. 1902, section 511, it is provided that each sheriff is entitled to charge and receive certain fees, and it is further provided therein that, "when sheriffs perform official duties in justices' courts, their fees shall be the same as allowed constables."

1. SHERIFFS:
fees.

In Code, section 4591, it is provided that "the constable is the proper executive officer in a justice's court, but the sheriff may perform any of the duties required of him." We think it is clear that in thus performing the duties of constable the sheriff acts as sheriff, and not as constable, and therefore that the fees received by him for such services are fees for performing the duties of sheriff which are to be taken into account in fixing his salary.

II. In settling with defendant at the expiration of his term of office, the board of supervisors did not take into account the fees received by defendant for services in connection with proceedings in justices' and mayors' courts. But it is contended that they assumed defendant was entitled to those fees in addition to any compensation for his services, and that, therefore the settlement with him is conclusive as against the county. In a case decided since the trial in the lower court we have held that officers of a public or municipal corporation cannot bind the corporation by paying as fees or compensation for services provided for by law a larger amount than authorized by statute, and that any excessive payment may be recovered back by an action at law. *State v. Young*, 134 Iowa, 505. In this case it is definitely stated that the case of *Painter v. Polk County*, 81 Iowa, 242, in which such a settlement was held conclusive, had been in effect overruled in *Heath v. Albrook*, 123 Iowa, 559.

2. SAME: excessive payment: recovery by county.

Following the decision in *State v. Young*, *supra*, we

have no difficulty in reaching the conclusion that the settlement in which the board of supervisors failed to take account of fees received by defendant in justices' and mayors' courts was not conclusive; and, as we find that those fees ought to have been taken into account, the judgment of the trial court must be *reversed*.

E. R. LACEY, Executor of the Estate of John L. Collins, deceased, v. MARGARET M. COLLINS, Appellant.

Wills: LEGACIES: PAYMENT FROM REALTY. Where the intention of a testator to charge his realty with the payment of legacies is clearly deducible from the language of his will it may be resorted to for that purpose, although omitting to expressly so direct, in the absence of sufficient personalty; and a general pecuniary legacy together with a gift of the residue of the entire estate conclusively manifests an intention to charge the real estate as well as personalty.

Appeal from Louisa District Court.—HON. W. S. WITHROW, Judge.

TUESDAY, JUNE 4, 1907.

THE will of John L. Collins, with a codicil attached, was admitted to probate March 29, 1904, and, in so far as material to this controversy, was in words following:

First. I desire that all my just debts be paid including my funeral expenses.

Second. I bequeath and devise to my daughter, Margaret M. Collins (legally adopted by my wife and myself, her former name being Rebecca Crilley), all the remainder of my property of every kind, both personal and real, to have and to hold and do with as may seem best by her, and she shall be my sole legatee.

Third. I desire, and do hereby nominate and appoint E. R. Lacey as my executor of this my last will and testament, and to give such bond as the court may direct.

Fourth. I desire that the Independent Order of Odd Fellows of Columbus Junction, Iowa, shall take charge of my remains and direct the funeral services.

Fifth. I desire that a suitable tombstone to be placed at the grave of myself and wife, not to exceed the sum of one hundred dollars each, and on my monument I desire to have the Emblem of the I. O. O. F. and to be similar to that of R. Caldwell's monument in the Columbus City Cemetery.

Codicil.

I, John L. Collins, hereby amend my will heretofore made, by adding this as a codicil, to wit: I give and bequeath my sister Ellen Collins, (\$1,000.00) one thousand dollars, to be paid her by my executor, and except for this change, I readopt my former will.

E. R. Lacey was duly appointed executor of the estate and in August, 1905, filed his report, and a few days later applied to the court for an order to sell certain real estate to procure funds out of which to pay the legacy of Ellen Collins. To this Margaret M. Collins objected, on the ground that real estate is not liable, under the terms of the will, for the payment of the legacy. On hearing the sale was ordered as prayed. Margaret M. Collins appeals.—*Affirmed.*

E. B. Tucker and L. A. Reiley, for appellant.

C. A. Carpenter, for appellee.

LADD, J.—The sole question for determination is whether the legacy to Ellen Collins is payable out of the real estate of deceased. The personal property left by him was inadequate to meet the indebtedness of the estate and pay the funeral expenses. The will speaks as of the date of the testator's death, and the codicil is to be construed as part of it. Looking thereto, the intention of the testator appears to have been: (1) That his debts, including funeral ex-

penses, be paid; (2) that tombstones be erected at the graves of himself and wife at a cost not exceeding \$200; (3) that \$1,000 be paid by his executor to his sister, Ellen Collins; and (4) that "all the remainder of my property of every kind, both real and personal," pass to his adopted daughter, Margaret M. Collins. The will recites that "she shall be my sole legatee"; but this was modified by the bequest in the codicil to his sister. It will be observed that the disposition of property is not made in the will in the order above indicated, but as the debts, including funeral expenses, the erection of the monuments and the legacy to the sister are to be paid from the estate, and that left to appellant is designated as "all the remainder of my property of every kind, both real and personal," the intention that the adopted daughter shall take the residuary estate is manifest. See *Kightley v. Kightley*, 2 Ves. Jr. 328. No other inference is reasonably to be drawn therefrom. This being so, we have to say whether it was the intention of the testator to charge his entire estate, regardless of its character, with the payment of the legacy to Ellen Collins. The will contains no express provision to this effect, and, unless such intention is to be implied therefrom, the rule must prevail that, even though the personal estate is insufficient, it is not only the primary, but the only fund to which resort may be had for this purpose. *Morey v. Morey*, 113 Iowa, 152; *Newsom v. Thornton*, 82 Ala. 402 (8 South. 261, 60 Am. Rep. 743); *Montgomery v. McElroy*, 3 Watts & S. 370, (38 Am. Dec. 771); see *In re will of Newcomb*, 98 Iowa, 175. But where such intention is clearly deducible from the language of the will, the realty will be charged with the payment of legacies, notwithstanding the omission to expressly so direct. *Morey v. Morey*, *supra*; *Greville v. Brower*, 7 H. L. 703; *Wright v. Page*, 10 Wheat. (U. S.), 210 (6 L. Ed. 303); *McC Campbell v. McC Campbell*, 5 Litt. (Ky.), 97 (15 Am. Dec. 48); *Knotts v. Bailey*, 54 Miss. 235 (28 Am. Rep. 348); *Thurber v. Battey*, 105 Mich. 718 (63

N. W. 995); *McQueen v. Lilly*, 131 Mo. 9 (81 S. W. 1043); *Evans v. Beaumont*, 16 Lea (Tenn.), 713; *Arnold v. Dean*, 61 Tex. 249; *Lee v. Lee*, 88 Va. 805 (14 S. E. 534); *Van Winkle v. Van Houten*, 3 N. J. Eq. 172. And where the legacies are pecuniary and general, and there is a gift of the residue of the estate, both real and personal, and this is blended as one mass, the rule prevails that this conclusively manifests an intention to charge the entire residuary estate, both real and personal therewith. *Pitkin v. Peet*, 87 Iowa, 268; *Sloan's Appeal*, 168 Pa. 422 (32 Atl. 42, 47 Am. St. Rep. 889); *Brill v. Wright*, 112 N. Y. 129 (8 Am. St. Rep. 723, 19 N. E. 628); *Knotts v. Bailey*, *supra*; *Newsom v. Thornton*, *supra*; *Lewis v. Darling*, 16 How. (U. S.), 1 (14 L. Ed. 819). See numerous decisions collected in 19 Am. & Eng. Ency. of Law (2d Ed.), 1354 *et seq.* *Lee v. Lee*, 88 Va. 805 (14 S. E. 534). In the last case sometimes cited as holding that the rule is different where the bequest is by codicil, the latter provides for payment "out of any money due and belonging to my estate," and this was construed to point out the fund from which the legacy was to be taken. The basis of the rule is that a mixed fund has been created out of which to pay the legacies. *Tidd v. Lister*, 3 De G., M. & G. 857; *Ellis v. Bartrum*, 25 Beav. 110. It is not necessary that the word residue be used; it is sufficient if words of like import and equivalent in meaning, as in this case, be employed. *In re Hawden*, (1904) 1 Ch. 693; *Hart v. Williams*, 77 N. C. 426.

Guided by these well-established principles, the district court rightly held that the legacy to Ellen Collins was payable out of the realty, and its order directing the sale is approved.—*Affirmed*.

STATE OF IOWA, v. GEORGE C. HOFFMAN, Appellant.

134 587
140 644

Embezzlement: PUBLIC OFFICERS: INDICTMENT. Code, section 4840,

- 1 defines two forms of embezzlement by public officers, the first of public money or property, and the second of money or property coming into the hands of such officer by virtue of his office; and an indictment charging the latter need not allege a failure of defendant to account for the money coming into his hands.

Change of venue: DISCRETION. The court's discretion in refusing

- 2 to grant a change of venue on the ground of excitement and prejudice, growing out of a former trial on the same indictment, will not be interfered with on appeal, when the same is both controverted as well as supported by the usual affidavits on the subject.

Evidence: IMPEACHMENT BY USE OF GRAND JURY MINUTES. The

- 3 State may use the minutes of the testimony of a defendant taken before the grand jury, and read over to and signed by him, for the purpose of impeaching his testimony as a witness upon the trial, when the proper foundation has been laid.

Same. Proof of general good reputation for truth and veracity is

- 4 not admissible in support of the testimony of a witness impeached by proof of conflicting statements.

Embezzlement by official: PROOF ESSENTIAL. In a prosecution of a

- 5 public officer for embezzlement of funds coming into his hands by virtue of his office, the State need not affirmatively show failure to account therefore on demand, where it has clearly established a conversion of the funds.

Appeal from Lee District Court.—HON. HENRY BANK, JR.,
Judge.

TUESDAY, JUNE 4, 1907.

DEFENDANT was indicted for embezzling and converting to his own use certain money belonging to Lazo Banjanin and Emile Rapaich, which had come into his hands by virtue of his office as constable. From a judgment sentencing

him to imprisonment in the penitentiary on a verdict of guilty, the defendant appeals.—*Affirmed.* .

E. C. Weber and J. R. Frailey, for appellant.

H. W. Byers, Attorney General, and C. W. Lyon, Assistant Attorney General, for the State.

McCLAIN, J.—By motion in arrest of judgment the defendant questioned the sufficiency of the indictment on the ground that it did not allege that defendant had failed to account for the money which he is charged with converting to his own use. The allegation of the indictment is that defendant, being a constable, did “willfully, unlawfully, feloniously, and fraudulently embezzle and convert to his own use money, to wit, . . . belonging to Lazo Banjanin and Emile Rapiach, which said money came into the hands of said Hoffman by virtue of his said office.” Under this indictment, as conceded by defendant, the purpose was to charge the crime of embezzlement by a public officer as described in Code, section 4840. That section defines at least two forms of embezzlement by a public officer; the first being of public money or property, the second of any money or property coming into the hands of such officer by virtue of his office. What is said in the last sentence of the section with reference to failure to account upon demand relates to public money. That sentence, which was added to the section as it previously stood by chapter 67, of the Acts of the 26th General Assembly, creates a distinct form of the crime of embezzling public money, and the provision therein as to failure to account has no reference to the offense of embezzlement described in the preceding portion of the section. *State v. McKinney*, 130 Iowa, 370. As to the conversion of money or property coming into the hands of the officer by virtue of his office, which is not public money, the crime as

1. EMBEZZLEMENT: public officers: indictment.

described consists in the conversion, and with reference to such money nothing is said which indicates the necessity of alleging a demand or a failure to account. These facts might be material to be shown in order to establish conversion, but the criminal act consists in the conversion alone, and, if such conversion is shown otherwise than by evidence of failure to account on demand, the crime is sufficiently established. It is not necessary, therefore, to set out in the indictment the particular evidence by which the conversion will be established. The conversion itself is the ultimate fact, and the allegation of that fact in the indictment is sufficient.

The contention for appellant is that, where a statute creates an offense described in general terms constituting a legal conclusion, the indictment thereunder must specifically describe the offense, and bring it within the legal conclusion. But, if an act of a particular description is made criminal, nothing further need be alleged in the indictment than the doing of the specific act. Under such circumstances, it is sufficient to follow the language of the statute in describing the act charged. *State v. Johnson*, 114 Iowa, 430; *State v. Dankwardt*, 107 Iowa, 704; *State v. Porter*, 105 Iowa, 677. The conversion itself is the act, and nothing further need be alleged by way of description. This is the ruling in *State v. King*, 81 Iowa, 587, with reference to a conversion of public moneys. The court in that case says: "The gist of the offense is the wrongful conversion of the public money, and it is wholly immaterial and mere surplusage to state whether the defendant used it in paying his debts, in purchasing property, had it on deposit in bank, carried it on his person, or loaned it to others; and the fact that three different modes of concealing the money are set forth in the indictment is wholly immaterial."

Cases relied upon by counsel for appellant holding that it is necessary in an indictment of an officer for embezzling public money to charge that it is unaccounted for are not in

point. *State v. Brandt*, 41 Iowa, 593; *State v. Parsons*, 54 Iowa, 405. As already pointed out, this requirement of the statute that the money shall have been unaccounted for in order to constitute an embezzlement of public funds does not apply to an embezzlement by a public officer of money, not a part of the public funds, intrusted to him by virtue of his office and converted to his own use. The precedents for indictments given in the books do not, so far as we can discover, contain any further allegation than that of embezzlement and conversion. Bishop, *Directions & Forms*, sections 407-409; 1 McClain, *Criminal Law*, section 556a. If that allegation is an allegation of fact and not a mere conclusion of law, then it is sufficient, and we are not justified in holding in view of all the precedents that it is a mere conclusion of law. The objection to the indictment was not well taken.

II. The court overruled defendant's motion for change of venue, the grounds for which were supported and controverted by various affidavits as to excitement and prejudice

2. CHANGE OF
VENUE: dis-
cretion.

in the county resulting from the fact of a previous trial under the same indictment. The affidavits are in the usual form, expressing the convictions of the affiants one way or the other on the question whether in their opinion there was such excitement in the county resulting from the publication of proceedings on the former trial that a fair and impartial trial could not be obtained. Under such circumstances we have uniformly held that the discretion of the trial court in refusing to grant a change of venue would not be interfered with on appeal. See *State v. Icenbice*, 126 Iowa, 16, and other cases cited in that opinion, and in the notes to Code, section 5348.

III. Defendant was examined as a witness in his own behalf, and on cross-examination, for the purpose of impeachment, his attention was called to specific portions of the minutes of his evidence given before the grand jury investigating the charge against him. It is contended by counsel that

3. EVIDENCE:
impeachment
by use of
grand jury
minutes.

the action of the court in allowing portions of these minutes to be used by the State for impeaching purposes over defendant's objection was error. By Code, section 5258, it is provided that the clerk of the grand jury shall preserve minutes of the proceedings and of the evidence given before it, and that, when evidence is taken, it shall be read over to and signed by the witness. In this section, as it stood prior to the adoption of the present Code, there was no provision for having the evidence of the witnesses before the grand jury read over to and signed by them, and it was held that the minutes kept by the clerk of the grand jury under such provisions could not be used for purposes of impeaching the testimony of such witnesses as given on the trial. *State v. Hayden*, 45 Iowa, 11. In *State v. Reinheimer*, 109 Iowa, 624, decided after the present Code took effect, the previous case of *State v. Hayden* is followed; but the question there involved was as to the use of the evidence of the witness taken down by the shorthand reporter on the preliminary examination of defendant, and it does not appear that the witness had signed the evidence thus taken down before the committing magistrate. The provisions of Code, section 5227, relating to the preservation of the minutes of testimony taken before a committing magistrate, do not involve the reading to or signing by the witnesses of the minutes of their testimony. Therefore the minutes of the testimony of a witness on preliminary examination are subject to the same objection when offered by way of impeachment as minutes of evidence taken before the grand jury under the statutory provisions as they existed prior to the adoption of the Code of 1897. Under Code, section 5258, as it now stands, we have held that the minutes of testimony before a grand jury read over to and signed by the witness may be used on the trial for impeachment purposes. *State v. Phillips*, 118 Iowa, 660. In *State v. Woodward*, 132 Iowa, 675, it was held improper to use the minutes of a witness' testimony before the grand jury as a basis of asking

impeaching questions on cross-examination, the witness not being allowed on demand to examine the minutes on which the impeaching questions were founded, and, while it is assumed that such minutes could not be used, no reference is made to the case of *State v. Phillips, supra*, and the change in the statute is not referred to. We think there was no purpose in the decision of the case of *State v. Woodward* to overrule the express decision in *State v. Phillips*, in which it is said: "When a witness is shown to have voluntarily signed a written statement, the contents of which is fully disclosed to him, we see no reason in the statute or in the ordinary principles of the law of evidence why it is not always competent for the purposes of his impeachment when the proper foundation has been laid." There was no error, therefore, in allowing the State to use the minutes of the testimony of the defendant given before the grand jury for the purpose of impeaching his testimony as a witness on the trial.

IV. On the cross-examination of the defendant as a witness his attention was called, as already indicated, to conflicting statements which he had made in his testimony before

the grand jury, for the purpose of affecting
4. SAME. his credibility. In surrebuttal a witness was called for the defendant and asked as to defendant's general reputation for truth and veracity in the community, and on the objection of the State the witness was not allowed to answer. Assuming that the witness would have testified that defendant's reputation as to truth and veracity was good, we are asked to hold that, where a witness is impeached by showing inconsistent statements, his testimony may be re-enforced by proof of general good character as to truth and veracity. On this question the authorities are in direct conflict. See 2 Wigmore, Evidence, section 1108, where the view is expressed that general good reputation for truth and veracity is too remote to be admissible in support of the testimony of a witness impeached by proof of conflicting

statements. The authorities in this State support that view. *State v. Archer*, 73 Iowa, 320; *State v. Owens*, 109 Iowa, 1. We see no occasion for changing the rule which has been adopted by this court on the subject. Evidence of good character is usually admissible only where character has been assailed; for, in the absence of some attack, the character of the witness is presumed to be good. Contradictory statements are shown, not for the purpose of proving his general character as to truth and veracity to be bad, but to show that his testimony as to the particular matter with reference to which he is contradicted by proof of conflicting statements is not entitled to credit.

V. With reference to the giving and refusal of instructions a few suggestions only are necessary in support of the correctness of the court's action. The instructions asked and refused, so far as they contained correct propositions of law applicable to the evidence, were sufficiently covered by the instructions given. The instructions given are assailed because they fail to embody the requirement that defendant must be affirmatively shown to have failed to account for the money on demand. The objection here insisted upon by counsel is substantially the same as that made to the indictment for failing to allege failure to account. The court correctly instructed the jury as to what would constitute conversion, and how conversion might be proved. If conversion was established by sufficient evidence, then proof of specific demand and failure to account was not necessary.

No question was raised by the motion for a new trial, which the court overruled, that is not disposed of by the previous discussion, save the contention that the verdict is without support in the evidence. We think there is ample evidence to support the verdict, and we see no occasion to interfere with the conclusion reached by the jury.

The judgment of the trial court is therefore *affirmed*.

VOL. 134 IA.—38

HENRY WILSON and EUGENE SHONTZ, Appellees, v. THE BIG
JOE BLOCK COAL COMPANY, Appellant.

Evidence: CONCLUSION OF WITNESS. A witness should not be permitted to state his own opinion as to a material proposition of mixed law and fact, but should state the facts and leave the conclusion to be drawn therefrom to the court and jury.

Mines and Mining: LEASES: ROYALTY: EVIDENCE. Under a contract providing that the lessee of an undeveloped mine should mine not less than a stated quantity each year, and in any event to pay a minimum royalty unless unavoidably prevented from taking out coal, he should have been permitted to show in defense to an action for the royalty that the mine could not be worked at a profit owing to the peculiar formation of the coal deposit.

Same. A lease obligating the lessee to mine all coal underlying the leased premises is satisfied by a removal of such as can be reached by the reasonable expenditure of money and labor according to approved methods among practical miners in that territory.

Appeal from Appanoose District Court.—HON. C. W. VERMILLION, Judge.

TUESDAY, JUNE 4, 1907.

ACTION at law to recover rents or royalties upon a mining lease. Verdict and judgment for plaintiffs for \$1,000 and the defendant appeals.—*Reversed.*

J. M. Wilson, for appellant.

Howell & Elgin, for appellees.

WEAVER, C. J.—On January 20, 1893, the plaintiffs let to the Gladstone Coal Company the right to mine coal under a tract of land in Appanoose county, together with other privileges, which we need not stop to enumerate. By

the terms of the lease the lessees undertook to sink shafts to the underlying coal and to commence the work within six months and to complete the same as soon as it could be conveniently accomplished. In consideration of such lease the lessee undertook to pay the plaintiffs a royalty of five cents per ton, settlements to be made monthly. The lessees further stipulated as follows: "The parties of the second part agree that after one year from the time they commence shipping coal from said mine that they will mine and take out not less than 8,000 tons of coal each and every year thereafter, and, if they so fail to take out said amount, they agree to pay for the same at the rate of 5 cents per ton, but, if second parties are prevented from taking out said coal on account of any matters that they cannot avoid, then they shall not be required to take out any certain amount of coal or to pay for any amount not taken out." On October 28, 1896, the defendant herein purchased said lease from the Gladstone Coal Company and undertook the work of developing and operating the mine. Plaintiffs charge in their petition that the defendant has failed to observe the terms of the lease, in that it has failed to produce or to pay royalty upon the minimum quantity of coal provided for by the agreement, and allege that during the years 1896, 1897, and 1898 it produced only about 6,000 tons per year, and since the latter date has produced none at all. Based upon these allegations damages in the sum of \$2,900. are claimed. The defendant answers in denial, and alleges that the failure to produce coal was owing to no neglect or want of due effort on its part but that in opening the mine the coal deposit was found to be in such a defective condition and the natural difficulties to be overcome were so great as to render the operation of the mine impracticable, for which reason after due effort to operate the same it wholly and permanently abandoned the lease on or about August 13, 1898. It further alleges that this abandonment was made with the full knowledge of the plaintiffs, who made no objections thereto,

and gave defendant reason to believe that they acquiesced therein. The appellant does not question the sufficiency of the evidence to sustain the verdict, but rests its right to a reversal upon alleged errors occurring upon the trial.

I. As will be noted from the foregoing statement, one material issue presented by the proceedings was the alleged abandonment of the mine by the defendant with the acquiescence of the plaintiffs. As bearing upon

1. EVIDENCE:
conclusion
of witness.

this question the plaintiff Shontz, being examined as a witness in his own behalf, was asked by his counsel: "Now, while it is a fact that they did not operate the mine or try to, yet have they done anything in the way of surrendering over any of the things that they took or had while they were operating the mine?" To this inquiry the witness was allowed, over the defendant's objection, to answer, "No." The objection should have been sustained. The inquiry did not direct the attention of the witness to or call for a single specific word, act, or omission on part of the defendant; but called for the witness' conclusion or opinion upon a material proposition of mixed law and fact. Whether the defendant had "done anything in the way of surrendering" the mine or the property connected therewith depends entirely upon the things which it had done or omitted to do. The witness should have answered as to these facts, and left the conclusion to be drawn therefrom to the court and jury. This proposition rests upon principles which are elementary in the law of evidence.

II. The exceptions taken by appellant to several rulings of the trial court and to its instructions to the jury turn upon the question whether the defendant would be relieved from its obligation to pay a minimum

2. MINES AND
MINING: leases:
royalty:
evidence.

royalty of \$400. per year by the fact that the mine could not be profitably operated. By reference to the clause quoted from the lease, it will be seen that this minimum payment was not to be exacted if the

lessee was "prevented from taking out coal on account of any matters that it could not avoid." The testimony on part of the defendant tended strongly to show that after sinking a shaft to the coal and driving entries therefrom through the deposit numerous "faults" were found. As we understand it, a "fault," as the word is here used, refers to interruptions in the continuity of the coal deposit caused by displacements in the formation, or by a pinching together of the overlying and underlying rock strata. When a fault is encountered, the practicability, if not the possibility, of further mining in that direction, depends largely upon the ability of the miner to drive his entry through the intervening rock until the coal formation or deposit is again found. If the distance is not too great and the intervening rock is of a character to be penetrated, mining may be resumed with practical success; but, if the faults are too frequent and the distance and difficulty of driving the entries are too great, the mine is incapable of practical or successful operation.

There was evidence that the coal under plaintiff's land was found to be broken by numerous faults, varying from four to seventy-five feet in extent, thus materially interfering with operation of the mine. Referring to this condition, the plaintiff sought to show by expert operators that such a mine could not be worked with success or profit. This evidence was ruled out by the court with the remark: "I will allow you to show that it would be impracticable or impossible to carry on the work, but I don't think the question of profit is a proper element of it." Several witnesses were permitted to testify as to the practicability of working such a mine; but all testimony as to whether it could be worked at a profit or in competition with other mines in that vicinity was excluded.

After much consideration we reach the conclusion that in ruling out the evidence upon the proposition whether it was practicable to work the mine with profit the trial court was in error. The saving clause of the lease, by which the

lessee was to be relieved from the payment of royalty if prevented from taking out coal on account of matters which it could not avoid, must be given a reasonable construction. To say that it was intended to bind the lessee to continue paying the minimum royalty of \$400 so long as there was any possibility of producing 8,000 tons of coal per year, regardless of the expense required for such production and regardless of profit to the lessee, would certainly be unreasonable. This is not to say that the mere question of profit and loss which might arise by fluctuations in the coal market would affect the rights of the parties, for as to such hazards the lessee took his chances, but the language of the lease indicates that the parties had in mind the possibility of unforeseen natural difficulties in the operation of the mine, which was not yet opened and the practicability of working which had not yet been demonstrated. The venture at the date of the lease was still an untried experiment, and it is evident that the lessee did not desire to take upon itself the burden of paying royalty if upon opening the mine or at any stage in its operation it developed defects which rendered the production of coal either impossible or financially impracticable. We cannot presume that the plaintiffs intended to impose, or that the lessee intended to assume, any obligation to continue indefinitely to carry on the operation of a mine which by reason of "faults" or other natural defects could only be operated at a loss.

It is to be observed, also, that the lease in question is not for any definite term of years, but provides for its continuance until the parties of the second part shall take out and remove all of the coal underlying the leased premises. This cannot be construed as meaning the literal removal of all of the coal under the land, but rather the removal of all the coal which is capable of being mined by the exercise of reasonable skill and effort. Whenever that limit was reached, and further mining on the premises could not be

3. SAME.

carried on with reasonable expenditure of money and labor in accordance with the methods approved among practical miners in that territory, we think the obligation to continue the effort would be fulfilled and the duty to continue the payment of royalties would cease. We do not undertake to say that this point had in fact been reached by the defendant when it ceased to operate the mine, but the defendant was entitled to present its evidence in support of that theory and to have the question submitted to the jury. This conclusion is decisive of most of the material questions urged upon our attention in the arguments of counsel. Other exceptions to the rulings of the trial court do not appear to be well made, and we shall take no time for their discussion.

For the errors pointed out a new trial must be had, and for that purpose the judgment of the district court is *reversed*.

STATE OF IOWA v. JAMES K. SPAREGROVE, Appellant.

Infants: EXPOSURE: WHO LIABLE. One to whom an infant is con-

- 1 fided by its parent for the purpose of exposure is within the contemplation of Code, section 4766, making it a crime to expose a child under six years of age with intent to abandon it; and the question of whether the child was so confided is one of fact for the jury.

Intoxication as defense to crime: BURDEN OF PROOF. A defendant

- 2 cannot be convicted of a crime when at the time of its commission he was so under the influence of liquor as to be incapable of forming a criminal intent, but he has the burden of establishing such intoxication.

Instructions: UNCONTROVERTED FACTS: PREJUDICE. Where the jury

- 3 is told that defendant is indicted for exposing a child under six years of age and is given the substance of the statute, prejudice cannot be predicated on a failure to specifically call attention to the age of the child, especially where no question as to its age was raised upon the trial.

Appeal from Iowa District Court.—HON. O. A. BYINGTON,
Judge.

TUESDAY, JUNE 4, 1907.

THE defendant was tried and convicted of the crime of exposing a child, and he appeals.— *Affirmed.*

Tom H. Milner, for appellant.

H. W. Byers, Attorney General, and *Chas. W. Lyon*, Assistant Attorney General, for the State.

SHERWIN, J.— The facts necessary to a proper understanding of this case and the legal question involved herein are substantially as follows: The father and mother of an illegitimate child left the home of the girl's parents between seven and eight o'clock on the evening of June 14th, taking the baby, then about two weeks old, with them. By previous arrangement, the defendant, driving another rig, met these parties about eleven o'clock p. m. the same night between Marengo and North River Bridge, and the box containing the baby and some of its wearing apparel was transferred from the buggy in which it had been taken to that point, to the conveyance which was occupied by the defendant, and which he was driving. The parents of the baby continued on to the town of Marengo in their conveyance, and the defendant with his conveyance and the box and the baby also went to Marengo. There the father of the baby joined the defendant, and together they drove to Williamsburg, where the defendant deposited the box and the baby on the porch of the residence of Mrs. Mary Brannan, where the baby was found at about ten o'clock the next morning. The evidence tends to show that before reaching Mrs. Brannan's home, where the baby was left, the father gave it the nursing bottle containing milk, but that the defendant took it from the carriage, carried it to the porch of Mrs. Brannan's house, and left it there.

Code, section 4766, provides as follows: "If the

father or mother of any child under the age of 6 years, or any person to whom such child has been intrusted or confided, expose such child in any highway, street, field, house or outhouse, or in any other place with intent wholly to abandon it, he or she, upon conviction thereof, shall be imprisoned in the penitentiary not exceeding 5 years." The appellant contends that the facts in this case do not bring it within the intendment of this section of the statute, basing his contention upon the proposition that the "intrusting or confiding" named in the statute must be for a lawful purpose, and that a person who is intrusted with the care of such an infant for the purpose only of abandonment as therein defined cannot be convicted under the statute. We are wholly unable to agree with this contention. The statute nowhere defines the meaning that shall be given to the words "intrusted or confided" as they are therein used, and our search of the authorities independently or with the aid of the briefs of counsel has afforded us no light in placing a construction thereon. There can, however, be no question as to the intent of the Legislature in enacting the statute in question. It is manifest that it was intended to cover just such transactions as the one in question. If it were to be held that the custody of such a child must be for a lawful purpose, it would afford an easy way for the parents of such children to abandon them without necessarily becoming implicated in the crime themselves. The defendant in this case was, in a sense, intrusted with this little baby. He undertook, as the record fairly shows, to take charge of it and care for it until he could deposit it at a place where he might presume at least that it would be discovered, and we think there is nothing in the statute, either in its language or in its spirit, which would justify the construction thereof contended for by the appellant.

It may further be said that the question whether the child was intrusted or confided to the defendant is a ques-

tion of fact and not of law, and that, being the former, it was properly left to the determination of the jury. It is true that the father of the child accompanied the defendant from Marengo to the place where the baby was finally left, but we think this fact cannot change the situation of the defendant. The baby was in his custody from the time it was transferred to his buggy between Marengo and North River bridge until he finally left it where he did, or, at least, the jury may have so found under the evidence; and, this being true, he is guilty of the charge made in the indictment.

The defendant introduced evidence tending to show that he was intoxicated at the time of the transaction in question, and the court in its instructions fully covered this

2. INTOXICATION
AS A DEFENSE
TO CRIME:
burden of
proof.

phase of the case by telling the jury that there could be no conviction if it was found that the defendant was so much under the influence of liquor that he was incapable of forming a criminal intent, and, further, that the burden of proof was upon the defendant to show that he was so intoxicated as to be incapable of forming such intent. No just criticism can be made of this instruction. It followed the established rule in this State. *State v. Yates*, 132 Iowa, 475.

The appellant also complains because the instructions did not specifically call the attention of the jury to the age of the child, but we are of the opinion that it was not neces-

3. INSTRUCTIONS:
uncontroverted
facts: preju-
dice.

sary in view of the record in this case. The court in one of its instructions told the jury that the defendant was indicted for exposing a child under the age of six years, and he then gave to the jury the substance of the statute under which the indictment was found. He further said that, in order to convict, the State must establish "beyond a reasonable doubt that the child which is alleged to have been exposed in this case" was intrusted or confided to his care, and "that he

exposed said child with intent wholly to abandon it." There was no question in the case as to the child's age when it was abandoned, and we are unable to see how any possible prejudice could have resulted to the defendant because the court did not specifically instruct that the jury must find that it was under the age of six years. Had such question been submitted to the jury, but one finding could have been made, and, in view of the instruction which we have already quoted, there can be no question that the jury understood that, before a conviction could be had, it must be found that the age of the child was within the limit fixed by the statute.

We have given the record in this case careful examination, and are unable to discover any error for which there should be a reversal. The judgment is therefore *affirmed*.

IN THE MATTER OF THE ESTATE OF EDWARD BERNHARD,
Deceased, HENRY WOLLGAST and CARL WOLLGAST, Ap-
pellants, v. AMELIA HENNING, IDA WORDELL ET AL.,
Residuary Legatees in the Last Will and Testament of
Edward Bernhard, Deceased.

134	603
142	667

Where a testator after devising real estate makes a contract for the sale thereof which is enforceable against him, the conversion from realty into personalty may be completed after his death by payment of the purchase price, even though the contract is executory in character; and the proceeds will be distributed as personalty.

Appeal from Lee District Court.—HON. HENRY BANK, JR.,
Judge.

TUESDAY, JUNE 4, 1907.

APPLICATION in probate by the appellees praying for an order for the distribution of certain funds in the hands of the executor of the estate of Edward Bernhard, deceased.

also, to the same effect, *Grimmel v. Warner*, 21 Iowa, 11; *Blair v. Marsh*, 8 Iowa, 144; *Hartman v. Clark*, 11 Iowa, 510; *Gamut v. Gregg*, 37 Iowa, 573; *Miller v. Corey*, 15 Iowa, 166; 11 Ency. Law (2d Ed.) 843; *Moore v. Burrows*, 34 Barb. (N. Y.), 173.

We are abidingly satisfied that the district court reached the right conclusion in this case, and its judgment must be and it is *affirmed*.

I. H. TOMLINSON, Appellee, v. MONROE COUNTY, Appellant.

Appointment of counsel for accused: COMPENSATION FOR SECOND

1 TRIAL. An attorney appointed by the court to defend one charged with a crime need not be again appointed, after a reversal of the case on appeal, to entitle him to pay from the county for defending the prisoner on the second trial.

Same: AMOUNT OF COMPENSATION. Counsel appointed to defend

2 one charged with a homicide punishable by life imprisonment is entitled to the same fee on a retrial as on the first trial of the case, although the first trial amounted to an acquittal of all degrees of the crime, except manslaughter, which is not punishable by life imprisonment.

Appeal from Lucas District Court.—HON. C. W. VERMILION, Judge.

TUESDAY, JUNE 4, 1907.

ACTION to recover attorney's fees. From a judgment for plaintiff, defendant appeals.—*Affirmed*.

A. C. Parry and Stuart & Stuart, for appellant.

Mitchell, Tomlinson & Price, for appellee.

DEEMER, J.—An indictment was found in the year 1902 by the grand jury of Monroe county against one Thomas Smith, charging him with the crime of murder in

the first degree. Plaintiff herein, upon a proper showing, was appointed by the court to defend Smith, and upon a trial to a jury he (Smith) was convicted of manslaughter. Upon appeal to this court the judgment was reversed, and the case remanded for a retrial. Without other formal appointment, plaintiff defended Smith upon the retrial, in which service he was engaged for eight days. Plaintiff was compensated for his services upon the original trial, and for his appearance in this court on appeal, and by the judgment of the trial court was allowed \$160 for his services on the second trial. From this judgment, defendant appeals.

For appellant it is contended first that plaintiff is not entitled to anything for his services upon the second trial, because not reappointed by the trial court; and, second, that if he is entitled to anything the statute fixes his compensation at the arbitrary sum of \$10. These contentions call for a construction of sections 5313 and 5314 of the Code, which read as follows:

Sec. 5313. Right of Counsel. If the defendant appears for arraignment without counsel, he must before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel, and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours.

Sec. 5314. Fee for Attorney Defending. An attorney appointed by the court to defend a person indicted for homicide or any offense the punishment of which may be life imprisonment, shall receive from the county treasurer a fee of \$20.00 per day for time actually occupied in court in the trial of defendant. If the prosecution be for any other felony, he shall receive the sum of \$10.00 in full for services. Such attorney need not follow the case into another county or into the Supreme Court, but if he does so shall receive an enlarged compensation on a scale corresponding to that fixed by this section. To be entitled to such compensation, the attorney must file with the court his affidavit that he has not directly or indirectly received or

when homicide is charged, but the crime alleged, which controls. To sustain defendant's contention, we would be compelled to insert the word "murder" in place of "homicide," or the words "any other offense the punishment of which may be life imprisonment," and, even if the latter phrase were used, there would be doubt as to the proper construction. The statute we have to construe is not one where particular words are followed by general ones, in which the general words are restricted by the particular ones. Here the term "homicide" is used distinctively, is generic in character, and needs no interpretation. The word "homicide" is specific, and the words "or any offense" do not limit such offenses to those of the character of homicide. Neither does the statement as to the punishment of any offense in any manner refer to the specific term "homicide." The statute needs no interpretation, and, when the term "homicide" is used, we do not think of it with reference to its punishment; so that there is no thought in the mind of speaker or reader of any limitations upon it. Had the word used been "murder," we would have an entirely different proposition. It is the nature of the charge in the one case, and the nature of the punishment in the other, which controls. In such cases there is no room for construction. To state it in another way, the words used in this statute are not *ejusdem generis*. The provision for compensation as to any offense punishable by life imprisonment was not intended to give color to the word "homicide," but for a distinct purpose as the offenses are in no matter related.

The trial court was right in allowing plaintiff compensation at the rate of \$20 per day, and its judgment must be, and it is, *affirmed*.

NEW YORK LIFE INSURANCE COMPANY, Appellant, v. CHITTENDEN & EASTMAN and C. W. WALDECK.

Administration of estate of absentee. While as a general rule a
1 probate court has no jurisdiction to administer the estate of a
person still living, yet it may be provided as in Code, section
3307, that where a person has absented himself from the State
and concealed his whereabouts from his family for a series of
years his property may be administered upon in the same form
of proceeding as that of a deceased person; and the adminis-
tration will be valid against the absentee and all persons in-
terested, although he is in fact still living.

Insurance: COMPROMISE AND SETTLEMENT: ESTOPPEL. Where an as-
2 sured has absented himself from the State and concealed his
whereabouts for a period of seven years, and rather than con-
test the question of his death the insurance company elects to
pay the loss to a duly appointed administrator, it amounts to a
compromise and settlement based on the assertion of his
death and is binding and conclusive on the company, though
it may afterwards appear he was still living.

Payment: MISTAKE: RECOVERY BACK. The rule that a payment
3 made under a mutual mistake may be recovered back is not
applicable, where, under an assumption of facts known to
both parties to be doubtful there has been a voluntary pay-
ment.

Principal and agent: SCOPE OF AUTHORITY. Where an insurance
4 agent has been authorized to deliver drafts in settlement of a
death claim, his acts and declarations in effecting a settlement
are binding upon the company, notwithstanding any limitations
contained in the policy.

Appeal from Des Moines District Court.—HON. W. S.
WITHROW, Judge.

TUESDAY, JUNE 4, 1907.

ACTION to recover back the money paid on a life insur-
ance policy under mistake as to the death of the insured.

On trial without a jury the court rendered a judgment for defendants, from which plaintiffs appeal.—*Affirmed.*

Seerley & Clark and James H. McIntosh, for appellant.

Blake & Wilson and Power & Power, for appellees.

McCLAIN, J.—Two policies were issued by plaintiff to one Jarvis on the 9th day of September, 1889, each for \$1,350, payable on his death to his wife, or, if not living, to his children, or, if no children should survive, then to the executors, administrators, or assigns of the insured. Prior to the 25th day of December, 1894, the wife of the insured had died, and he was without children, and he had assigned the policy of the defendants Chittenden & Eastman, a partnership to whom he was indebted, and forwarded a copy of this assignment to the plaintiff. It appears, also, that prior to the assignment to Chittenden & Eastman there had been another assignment by way of security to the Iowa State Savings Bank which had not been forwarded to the plaintiff, and was not known to it when the assignment to Chittenden & Eastman was received and recognized. On the last above date Jarvis, the insured, disappeared from his home in Burlington, and was not heard of for more than seven years. At the April term, 1902, of the district court of Des Moines county, the Iowa State Savings Bank applied as creditor for the appointment of an administrator for the estate of Jarvis, alleging his disappearance, and that his whereabouts had continued unknown to his friends and the members of his family, and that he had not been heard from. Proper proceedings were had, under which defendant Waldeck was appointed administrator of the estate of Jarvis, and a claim was then made jointly by Waldeck as administrator and Chittenden & Eastman as assignees for payment of the policies held by Jarvis in the plaintiff company; and proofs of death were furnished by Waldeck, in

which were the following statements: “ (7) Date of death: During Christmas week, 1894. (8) Place of death: The assured disappeared, and since that date he has not been heard from. There was nothing in his family or business relations to explain his absence. His brother at the time of his disappearance was a resident of Burlington, Iowa, and has ever since continued to reside there and the most pleasant relations existed between them. . . . (10) In what capacity, or by what title, do you claim this insurance? As administrator of the estate of the assured.” Negotiations were had between attorneys representing the administrator and an agent of the insurance company in which it was insisted for the administrator that the insurance money was due and payable, and that, unless it was paid, suit would be instituted on the policies. Subsequently two drafts for the amount specified in the policies payable jointly to Chittenden & Eastman, assignees, and C. W. Waldeck, administrator, were tendered to the attorneys for the administrator by the agent of the plaintiff, with the condition that the administrator and assignees should give a bond of indemnity to the company for the return of the money in case it should be subsequently discovered that Jarvis was not dead at the time of this settlement. The attorneys for the administrator refused in behalf of their client to furnish such bond, and thereupon the drafts were delivered without further insistence upon this condition. The proceeds of the drafts were paid in part to the Iowa State Savings Bank, and in part to Chittenden & Eastman. It is conceded that after this payment and the distribution of the proceeds thereof by the administrator Jarvis was alive, and, on the discovery of this fact in April, 1905, the company tendered back the policies of insurance and demanded the return of the money paid, and on refusal this suit was instituted. As the payment of the insurance was by drafts made jointly to Chittenden & Eastman and Waldeck, this suit is no doubt properly instituted against them jointly, although the money has

been in part distributed to the Iowa State Savings Bank, which is not a party to this action; but, as our conclusions in the case are not dependent on the extent of the liability, respectively, of Waldeck and Chittenden & Eastman, we shall give that subject no further consideration.

I. If Waldeck as administrator was entitled to maintain a suit against plaintiff under the authority given him in the administration proceeding and to recover the insurance money which was in fact paid, plaintiff

1. ADMINISTRATION OF ESTATE OF ABSENTEE.

had no right to recovery as against him individually, for he had done what by law he was authorized to do, and could not be held individually liable. The first question, then, as we think, is whether the proceedings for administration on the estate of Jarvis were valid. It seems to be conclusively settled by adjudications that a probate court acquires no jurisdiction by proceeding to administer on the estate of a person on the ground that he is dead if in fact he is alive, and such proceedings are entirely invalid, and any judgments or orders made in pursuance thereof, and any action taken thereunder, are absolutely void as against the person who is erroneously adjudged to be dead. Without citing the many authorities supporting this proposition, it is sufficient to say that any such proceeding, if sustained, would result in depriving the person erroneously adjudged to be dead of his property without due process of law. *Scott v. McNeal*, 154 U. S. 34 (14 Sup. Ct. 1108, 38 L. Ed. 896).

But, in the exercise of its jurisdiction over property within the State, it may be provided by the legislature that after the absence of the owner unheard of for a specified period such property may be administered upon in the same form of proceeding as is provided for administration upon the property of a person deceased, and such administration will be valid as against the absentee and all persons interested, although he is in fact not dead. *Cunnius v. Reading School District*, 198 U. S. 458 (25 Sup. Ct. 721, 49 L. Ed.

1125). Section 3307 of our Code provides for such an administration on the estate of one who has absented himself from the State and concealed his whereabouts from his family for a period of seven years, and under the decision last above cited we have no doubt that this section is constitutional and provides for a proceeding which may properly be resorted to in such cases, and which is conclusive on the absentee and those claiming under him. The administration granted as to the property of Jarvis was in accordance with the provisions of this section, and we think it was valid.

Waldeck as administrator had the right, therefore, to receive from the plaintiff the proceeds of the policies on Jarvis' life so far as such proceeds were payable to his administrator, and, as Chittenden & Eastman assented to such payment and to the distribution of the proceeds by Waldeck as administrator, there was a final settlement under the policies, which, if Jarvis had been in fact dead, would have been binding on all parties. It may be conceded that the policies did not mature simply on the granting of administration on the estate of Jarvis as an absentee. The conditions of the policies were that the sums named therein should be paid on Jarvis' death, and, as already indicated, the administration was not conclusive as to the fact of his death, but only as to the fact of his absence and the concealment of his whereabouts from his family for seven years. But the facts which justified the administration would also as evidence have established a right of action on the policies by the administrator and the assignees to recover the insurance money, for those facts would have been sufficient evidence of death to sustain a judgment based on that fact. The plaintiff company was thereupon brought face to face with the question whether it would pay the amounts of the policies or stand suit thereon, and question the fact of the death of Jarvis.

It may further be suggested that the obligation of the plaintiff under its policies was to pay the amount named

2. INSURANCE:
compromise
and settlement:
estoppel.

therein to the proper beneficiary within sixty days after due notice and satisfactory proof of death, and that proof of death stating the facts which, if established, would show the liability of the company was furnished, and no objection thereto on the part of the company was made. Under these conditions, and for the purpose of avoiding an action on the policies, the plaintiff company elected to pay over the amount thereof to the persons entitled to receive the insurance money if Jarvis were in fact dead, and this compromise and settlement of a claim based on the assertion of his death was, we think, binding and conclusive on the company. Had a judgment been secured in an action by the administrator with authority to represent the rights of all persons interested in the proceeds of the policies, such judgment would have been conclusive as to the death of Jarvis, and the company could not, after paying the amount of such judgment, have recovered back the money paid on discovering that the essential fact in issue in the case, to wit, the death of Jarvis, had been erroneously adjudicated. The judgment would have been conclusive as to that fact. Therefore we think that a settlement by which the money was paid for the purpose of avoiding a suit in which such a judgment might have been rendered is also conclusive, and that plaintiff cannot now recover back the money thus paid.

In a case quite similar in its essential facts to the one now before us the Court of Appeals of New York held that an arrangement for the payment of the amount of the policies entered into in view of the assumed death of the assured as indicated by his absence unheard of for more than seven years was binding after it had been ascertained that he was still living; such arrangement having been made with regard to the chances of success of the claimant under the policy at the time when the insured was thought to be dead. In that case, as in this, "clearly but one thing was dealt with or could be in the agreement of settlement, to wit, the possibility that the insured should prove to be alive." *Sears v.*

Grand Lodge, 163 N. Y. 374 (57 N. E. 618, 50 L. R. A. 204). In the case before us there was no compromise, it is true, as to the amount to be paid; but there was a compromise on the question whether anything was payable, and for the purpose of avoiding litigation the plaintiff elected to make payment. A voluntary payment is usually conclusive, and cannot be recovered back. *Manning v. Poling*, 114 Iowa, 20; *James v. Dalbey*, 107 Iowa, 463; *Davenport & St. P. R. Co. v. Rogers*, 39 Iowa, 298; *Bailey v. Paullina*, 69 Iowa, 463; *Baldwin v. Foss*, 71 Iowa, 389; *Lyman v. Lauderbaugh*, 75 Iowa, 481; *Weaver v. Stacey*, 93 Iowa, 683; *Windbiel v. Carroll*, 16 Hun. (N. Y.), 101; *National Life Ins. Co. v. Jones*, 1 Thomp. & C. (N. Y.), 466.

II. Counsel for appellant insist that this payment was one made under a mutual mistake of fact, and that in accordance with a well-recognized equitable principle money thus paid may be recovered back. The rule thus invoked is not applicable, however, where under an assumption of fact known to both parties to be doubtful there has been a voluntary payment in extinguishment of a claim. The principle is thus stated in 1 Pomeroy, Equity Jurisprudence (2d Ed.) section 855:

3. PAYMENT:
mistake: recovery back.

Where parties have entered into a contract or arrangement based upon uncertain or contingent events purposely as a compromise of a doubtful claim arising from them, . . . and there is . . . an absence of bad faith, violation of confidence, misrepresentation, concealment, and other inequitable conduct, . . . if the facts upon which such agreement or transaction was founded . . . turned out very differently from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to a matter of fact and not of law, is not such a mistake within the meaning of the equitable doctrine as entitles the disappointed party to any relief. . . . In such classes of agreements and transactions the parties are supposed to calculate the chances, and they certainly assume the risks.

And at another place in the same work (section 849) the author uses this language: "It should be carefully observed that this rule [allowing recovery of money paid under mistake] has no application to compromises where doubts have arisen as to the rights of the parties, and they have intentionally entered into an arrangement for the purpose of compromising and settling those doubts. Such compromises, whether involving mistakes of law or fact, are governed by special consideration." The foregoing quotations are made part of the opinion in *Sears v. Grand Lodge*, 163 N. Y. 374 (50 L. R. A. 204), as applicable to a case very similar to the one before us. In *Riegel v. American Life Insurance Co.*, 140 Pa. 193 (21 Atl. 392, 11 L. R. A. 857, 23 Am. St. Rep. 225), and on a subsequent appeal, 153 Pa. 134 (25 Atl. 1070, 19 L. R. A. 166), it was decided that the holder of a policy accepting its surrender value under the assumption that the assured was still alive might, on proving that in fact the insured had already died, recover the balance of the face of the policy which had matured by the death of the assured without the knowledge of either party. But it is evident that, under these circumstances, there was a mistake as to a fact not within the contemplation of either party in entering into the arrangement. In the case before us the question whether Jarvis was dead was distinctly within the contemplation of both parties, for it was expressly recited in the proof of loss that he had been absent for more than seven years, and had not been heard of within that time. The only question of controversy between the parties in determining whether or not the insurance money should be paid was as to whether Jarvis was dead, and the plaintiff conceded its liability by voluntarily paying the claim. In the absence of fraud or concealment, the means of knowledge as to the fact in controversy being equally accessible to each party, the payment is conclusive. *Egan v. Aetna F. & M. Ins. Co.*, 10 W. Va. 583; *Mutual Life Ins. Co. v. Wager*, 27 Barb. (N. Y.), 354.

III. With reference to the consideration of the negotiations between the agent of plaintiff and the attorney for the administrator, it is contended that the acts and statements of the plaintiff's agent were not binding upon it, for the reason that they are not shown to have been within the scope of his authority, which was limited by stipulations in the policy. It is enough to say that this agent had authority to represent the company in delivering the drafts to the defendants in payment of the claims under the policies, and that what he did and said in connection with the effecting of this settlement must be binding upon the plaintiff. It is to be remembered that he at first refused to deliver the drafts until a bond of indemnity was furnished, and that afterwards, on a representation made to the company by counsel for the administrator, that no bond would be furnished, and that, if not voluntarily paid, the right of recovery under the policies would be litigated, the agent delivered the draft without further condition. Certainly what this agent said and did was within the scope of his authority, regardless of any provisions in the policy. The company is now relying on the delivery of these drafts as constituting the very payment which they make the basis of their right to recover back the money paid, and cannot question the authority of the agent through whom such payment was made.

The judgment of the trial court is therefore *affirmed*.

EDWARD FRAZER ET AL., Appellees, v. LOUISA J. ANDREWS
ET AL., Appellants.

Husband and wife: ANTE-NUPTIAL AGREEMENT: STATUTE OF FRAUDS.

- 1 The ante-nuptial oral agreement that neither of the parties nor their heirs shall have any interest in the property of the other as a result of their marriage is within the statute of frauds and cannot be proven, even though the same is reduced to writing after marriage, unless the writing recites that it is

to furnish evidence or is in consideration of the prior oral agreement.

Pleadings: FORM. A pleading which assails certain clauses of a 2 petition and not the entire cause of action should be treated as a motion to strike rather than as a demurrer, although so denominated.

Appeal from Henry District Court.—HON. JAMES D. SMYTHE, Judge.

TUESDAY, JUNE 4, 1907.

ACTION to partition certain real estate. Defendant Eliza D. Smith filed a demurrer to plaintiff's petition in so far as plaintiffs, except Albert Frazer, claimed more than one-seventh of two-thirds of the real estate, and to the petition of said Frazer in so far as he claimed more than two-sevenths of two-thirds of the real estate. This demurrer was overruled, and, said Smith electing to stand thereon, judgment was entered as prayed in plaintiff's petition. Smith appeals.—*Reversed.*

W. F. Kopp, for appellants.

Babb & Babb, for appellees.

DEEMER, J.—Plaintiffs are the children of Mary M. Coffin, formerly Mary M. Frazer, who died intestate August 2, 1904, leaving surviving seven children, five of whom are plaintiffs and two, Eliza D. Smith and Alson G. Frazer, are defendants. Before the bringing of the suit Alson G. Frazer had conveyed his interest in his mother's estate to plaintiff Albert H. Frazer. It is alleged that each of said children was entitled to an undivided one-seventh of the real estate of their mother, save Albert Frazer, who was entitled to two-sevenths. It is also alleged that Mary M. Coffin left surviving her husband, John M. Coffin, who soon thereafter also died intestate, leaving a number of children and grand-

children, all of whom are made defendants; they being his children and grandchildren by a former marriage. All of said children and grandchildren, save Alice Randolph, had prior to the beginning of this suit transferred their interests to defendant and appellant Eliza D. Smith. It is alleged that neither John M. Coffin nor his heirs had any interest in the land in suit. We now quote the following from the petition which goes to the very vitals of the controversy.

That the said Mary M. Frazer and the said John M. Coffin were intermarried to each other on August 26, 1896, that at said time each of said parties were of advanced years, and each had a number of children by a former spouse, and also that each was the owner of certain real and personal property; that the real estate in question was then owned by the said Mary M. Frazer; that they were each desirous that neither should acquire any right or interest in the property of the other, and they agreed in parol prior to their marriage that each of them should hold absolutely all the real and personal property owned by each of them, respectively, at the time of their marriage, free from any right, claim, dower, homestead, distributive share, or other interest in the property of the other, and that upon the death of either of them the children of such deceased one should take all the property of the one so dying, free from any claim, right, or interest of any kind of the survivor of said two-named parties; that said agreement was made in consideration of said contemplated marriage and of their mutual relinquishment of their rights in the property of the other; that subsequent to said agreement and in pursuance thereof the said parties intermarried on August 27, 1896, and that after their marriage, for the purpose of preserving the written evidence of said oral agreement made before their said marriage and to carry the same out, they reduced said agreement to writing as evidence of said oral agreement so made by them before their marriage.

The written agreement referred to, which was executed March 29, 1897, was signed by Mary M. Coffin and John M. Coffin, witnessed by two disinterested persons, and reads as follows:

This article of agreement made and entered into by and between Mary Coffin and John Coffin, her husband, of the county of Henry and State of Iowa, do each of them agree to relinquish to the other and their heirs all their rights, title, interest, in the real estate owned by each of them at the time of their marriage, 27th day of eighth month, 1896, as either one would heir according to law as husband and wife.

The demurrer challenges the claims made under and in virtue of these agreements, because the oral one is void under the statute of frauds and the written one is void under section 3154 of the Code prohibiting such contracts between husband and wife. It questions all claims made in virtue of these agreements. Our statute of frauds expressly provides that all contracts made in consideration of marriage must be in writing and signed by the party to be charged; and it also provides that those for the creation or transfer of any interest in land must also be in writing and be signed as above provided. Section 3154 provides that, when property is owned by husband or wife, the other has no interest therein which can be the subject of contract between them. It is perfectly plain that the oral contract made before the marriage by and between Mary M. Frazer and John M. Coffin, which was in parol was and is of no validity; and the consummation of the agreement to marry by ceremonial or other marriage, did not make the contract good. Section 4626 of the Code, relating to the effect of part performance, does not apply to contracts made in consideration of marriage.

Again under section 3154 the written contract between these parties, which was concededly made after marriage, was of no validity; as it is expressly forbidden. We have held, however, that if after the making of a parol antenuptial agreement the parties after marriage reduce it to writing, and in the writing recognize and put in force and give effect to the previous parol one, the written one will be given effect as

1. HUSBAND AND
WIFE: ante-
nuptial con-
tracts: statute
of frauds.

an antenuptial, and not a postnuptial, one. See *Kohl v. Frederick*, 115 Iowa, 517. The present case involves a somewhat different question, in that there is nothing in the writing itself which shows that it was executed to give effect to and make of writing a previous parol antenuptial agreement. In such cases the authorities from other States are in hopeless conflict, and we have not heretofore had occasion to pass upon the subject. Among those cases holding such an instrument good are *Moore v. Harrison*, 26 Ind. App. 408 (59 N. E. 1077); *Buffington v. Buffington*, 151 Ind. 200 (51 N. E. 328); *Cooper v. Wormold*, 27 Beav. 266; *Argenbright v. Campbell*, 3 Hen. & M. (Va.), 144. To the contrary are *McAnnulty v. McAnnulty*, 120 Ill. 26 (11 N. E. 397, 60 Am. Rep. 552); *Powell v. Meyers*, 23 Ky. Law, 795 (64 S. W. 428); *Smith v. Greer*, 3 Humph. (Tenn.), 118; *Borst v. Corey*, 16 Barb. (N. Y.), 136. In view of this conflict, it is manifest that apparently sound reasons may be given for either conclusion. We quote the following from *Moore v. Harrison, supra*:

Antenuptial contracts are favored by the law. They adjust property questions and promote domestic happiness. In such contracts no formality is required, and a liberal construction will be given them in every case, giving effect, if possible, to the intention of the parties. *Buffington v. Buffington*, 151 Ind. 200 (51 N. E. 328); *Kennedy v. Kennedy*, 150 Ind. 636 (50 N. E. 756); *McNutt v. McNutt*, 116 Ind. 545 (19 N. E. 115, 2 L. R. A. 372). The rule is well established that parties contemplating marriage may orally agree as to the disposition of their property, and they may confirm such agreement in writing after marriage. *Buffington v. Buffington, supra*; *Claypool v. Jaqua*, 135 Ind. 499 (35 N. E. 285). Such contracts are upheld in equity, *Leach v. Rains*, 149 Ind. 152 (48 N. E. 858), and it is not necessary to their validity that anything should have been paid by the wife to the husband, or that the consideration therefrom should be stated in the contract. 6 Am. & Eng. Ency. Law (2d Ed.), 758. It is the rule in Indiana that either party may show the true consideration for any

purpose, except to defeat the operation of the conveyance. *Nicolas v. Burch*, 128 Ind. 324 (27 N. E. 737); *Smith v. McClain*, 146 Ind. 77 (45 N. E. 41). In the case at bar the agreement was mutual, entered into before marriage, but in contemplation of marriage. The agreement to marry was the consideration for the contract, which provided for the disposition of the property of the contracting parties. After the marriage the contract was reduced to writing. The evidence which was introduced over appellant's objection did not, as is contended by counsel for appellant, tend to change or vary the terms of the written contract, and was not introduced for that purpose, and could not have been used to prove the terms of the contract. It simply went to the question of consideration. We think the contract entered into between the husband and wife in this case a valid and enforceable one, and that the evidence objected to was properly admitted for the purpose of showing the consideration for the contract, if, indeed, it was necessary, under the issues, for the appellee to make such proof.

The other view is represented by the following from the *McAnnulty case*, *supra*:

As this instrument was not executed until about a month after the marriage, it is clear that, if any agreement existed before or at the time of the marriage, it was a mere verbal agreement and as such it is obnoxious to the statute of frauds. . . . This alleged antenuptial agreement clearly comes within the provisions of this section, and the statute must be given effect unless something has occurred to take the case out of its operation. The signing of the written instrument after the marriage can be regarded at the very farthest as nothing more than a mere acknowledgment in writing of the terms of the previous verbal agreement, and this certainly does not meet the requirements of the statute, for the simple reason the statute requires the contract itself to be in writing. And by the following from the *Powell case*, *supra*: "The verbal antenuptial contract, as held in the cases referred to, is within the provision of the statute of frauds, and no action can be maintained upon it. . . . The evidence warrants the conclusion that the written contract was made pursuant to

the antenuptial verbal agreement, and, though no action could be brought upon the verbal agreement to charge the husband, equity will not relieve him from the written contract made pursuant to it and after it has been fully executed. By the writing quoted Mrs. Powell's property was settled upon her and her heirs at law. It was held by her as long as she lived, and at her death, by the consent or acquiescence of her husband, passed into the hands of her sister, Mrs. Meyers, as her heir at law. When this was done, the contract was fully executed and the settlement which the husband voluntarily made equity will not aid him to disturb, when the agreement is no longer executory, and he has entered upon another conjugal relation.

The nearest approach to a decision of the instant case is found in *Allen v. Bemis*, 120 Iowa, 172, wherein we said:

Plaintiff offered in evidence the writing, a copy of which appears in his petition, and is hereinbefore set out. This was objected to and the objection sustained. The grounds of the objection were that by the terms of the writing no obligation on the part of the defendant is created, and that the same does not, by its terms, constitute an agreement or memorandum of an agreement by defendant for the transfer of an interest in lands as required by the statute. It is not claimed by counsel for appellant that such writing of itself constitutes the contract for the breach of which this action is brought. It is their contention that the same is a written admission of the oral contract previously made as alleged, and that it is sufficient in character to establish the making of such oral contract. Passing the collateral question argued at some length in respect of the character of the agency of Miller and the lack of definite description of the property, we readily reach the conclusion that no effect can be given the writing such as appellant contends for. It contains no reference to any prior agreement, and by its terms is confined to matters then presently under consideration. . . . That parties may by writing make admission of a prior oral contract or agreement to sell lands is not to be doubted. And an oral contract thus established may be enforced as of the time made

as fully as the subsequent writing makes disclosures thereof. It is well settled, however, that in all such cases the court cannot look beyond the writing to ascertain the terms, conditions, or provisions of the contract. . . . Being insufficient in and of itself to establish the making of the oral contract upon which the plaintiff grounds his action, it must be held that the objection thereto was properly sustained.

This same rule was also announced in principle in *Leather Co. v. Porter Bros.*, 94 Iowa, 117, wherein we said:

It is also the general rule that the evidence necessary to take a contract out of the statute of frauds must all be furnished by the writings; parol evidence not being admissible to supply evidence not found in them. Our statute provides that no evidence of contracts such as that alleged in this case is competent unless it be in writing and signed by the party charged, or by his lawfully authorized agent.

In passing, it may be remarked as worthy of consideration that in Indiana they have no statute similar to our section 3154, which may perhaps account for the rule in that State. Chancellor Kent in a learned opinion in *Reade v. Livingston*, 3 Johns. Ch. (N. Y.), 481 (8 Am. Dec. 520), reviewed all the authorities, and held, as we understand it, that such a contract as is now before us is invalid. See, also, *Warden v. Jones*, 2 Deg. & J. 76; *Winn v. Albert*, 2 Md. Ch. 169; *Albert v. Winn*, 5 Md. 66; *Andrews v. Jones*, 10 Ala. 400; *Wood v. Savage*, 2 Doug. (Mich.) 316. Looking to our statutes for a guide, we are of opinion that, unless the agreement made after marriage recites that it is to furnish evidence or is in consideration of a previous antenuptial contract it is within the statute of frauds, or prohibited by section 3154 of the Code, and cannot be enforced.

It is argued, however, that the demurrer in the case was properly overruled, for the reason that it did not go to plaintiff's entire cause of action, but was
2. PLEADINGS: form. used simply as a pruning hook and was therefore properly overruled. That a motion is the proper

method whereby to get rid of immaterial, redundant or superfluous matter is the general rule. Ordinarily, if plaintiff is entitled to any relief, a demurrer to his petition is properly overruled. But no court is tenacious as to names. The so-called demurrer here did not challenge plaintiff's right to recover at all, but went to the question of his rights in so far as based upon the contract in question. It nowhere challenges plaintiff's right to an interest in the land, but went to his right to recover a particular interest therein. Although denominated a demurrer, it was in effect a motion to strike certain clauses from the petition, and was as we understand it, and should have been so treated. The following authorities support this view: *Rhoadabeck v. Blair*, 62 Iowa, 368; *Seiffert Co. v. Hartwell*, 94 Iowa, 576; *Chase v. Kaynor*, 78 Iowa, 449.

Having given the case the attention which its importance demands, we reach the conclusion that the demurrer should have been sustained.

The judgment is therefore *reversed*.

HERMAN KRAUSE, Appellant, v. AUGUST REDMAN, Appellee.

Issues of fact: QUESTIONS FOR THE JURY. It is for the jury to de-

- 1 termine fact issues and when its finding is fairly supported by the evidence the verdict will not be disturbed.

Depositions: OBJECTIONS: REVIEW. A general objection to the

- 2 offer of a deposition, that the necessary foundation for its introduction has not been laid, is insufficient to support the specific objection on appeal, that the certificate of the Notary and endorsement of the Clerk were not offered upon the trial; counsel should have pointed out this objection to the court below.

Instructions: WHEN NOT REQUIRED TO BE IN WRITING. The court is

- 3 not required to reduce to writing all the admonitions which it may be proper to give the jury during the progress of the trial, respecting the consideration of evidence.

Apportionment of costs. Where the main issue in a cause concerning which the principal costs are incurred is determined in favor of one party and a minor claim is either undisputed or admitted in favor of the other, but is not allowed by the jury, an offer to permit judgment for the minor item to avoid a new trial, with costs incident thereto, authorizes an equitable apportionment of the costs rather than a taxation of the entire amount to either party.

Appeal from Clay District Court.—HON. A. D. BAILIE,
Judge.

TUESDAY, JUNE 4, 1907.

THE opinion states the case.—*Affirmed.*

Buck & Kirkpatrick, for appellant.

G. H. Martin and *F. F. Faville*, for appellee.

WEAVER, C. J.—In September, 1901, the defendant was a resident of Illinois and the plaintiff, his son-in-law, resided in Clay county, Iowa. About the date named defendant visited the plaintiff in Clay county, and while there decided to purchase an eighty-acre farm if a suitable one could be found. After some investigation the plaintiff and defendant entered into a joint contract to purchase two eighty-acre tracts from one Bunce at the agreed price of \$53 per acre. By an agreement between themselves the defendant was to take in severalty the north eighty acres and the plaintiff the south eighty acres, and at their request Bunce made to them separate deeds of conveyance accordingly. Defendant did not have on hand the money with which to complete the purchase on his part, but thereafter sent or paid over to plaintiff a sum equal to one-half the purchase price of the one hundred and sixty acres, and plaintiff closed the deal with Bunce. The plaintiff claims, however, that an oral agreement existed between himself and defendant, whereby the latter, in consideration of obtaining the north

eighty, was to pay \$5,000 of the purchase money due to Bunce; and, as he has fully settled with the latter, plaintiff brings this action, demanding the recovery of the alleged unpaid remainder from the defendant. In other counts of his petition plaintiff seeks further recovery for oats and hay alleged to have been furnished the defendant, for a cow and calf and pigs sold to the defendant, for moneys advanced, and for rent of leased land. By his answer defendant admitted the joint purchase of the Bunce land and the agreement between himself and plaintiff that each should take an eighty-acre tract in severalty, but denies that he ever promised or agreed to pay for his portion any more than the price named in the contract with Bunce. As to the other claims asserted by the plaintiff, defendant denies them in part, and as to others alleges full payment. Upon the trial of these issues to a jury there was a general verdict for defendant, and plaintiff appeals.

I. The issues of fact here presented are sustained on either side by a large array of witnesses. We shall not attempt to review the evidence. So far as the merits of the controversy are concerned, it is sufficient to say there is no such decided or overwhelming preponderance in either direction as would authorize the court to interfere with the finding of a jury thereon. Plaintiff's claim is not without considerable support by corroborating witnesses and admitted circumstances; but, on the other hand, the defendant's denials are positive, and he also is sustained by much corroborating testimony. It was for the jury to determine the truth of the dispute, and the verdict must be accepted as final, unless some fatal error was committed by the court in the conduct of the trial.

II. Of the numerous errors assigned but few are argued by counsel. Of these we may mention the following: The deposition of Bunce, the seller of the land, was taken upon a stipulation of counsel, and both parties appeared

1. ISSUES OF FACT:
questions for
the jury.

and took part in his examination. The deposition was duly certified and filed in the office of the clerk.

2. DEPOSITIONS:
objections:
review.

No objections to the deposition or motion to suppress the same in whole or in part was filed by either party, and it was offered and admitted in evidence on behalf of the defendant. Its admission in evidence is now said to have been erroneous "because the certificate of the notary should have been produced, offered, and read in evidence, and the indorsement of the clerk upon the deposition should have been produced, offered, and read in evidence." We are wholly unable to appreciate the force of this contention. The only objection made to the deposition when offered was as follows: "The plaintiff makes the formal objection that no foundation has yet been laid for the introduction of the evidence." Thereupon the defendant's counsel read in evidence the stipulation upon which the deposition had been taken, and repeated his offer in evidence of the deposition taken pursuant thereto, and stated the name of the notary, the date when taken, and when filed in the cause. To this offer it was again objected that defendant had laid "no legal, sufficient, necessary, and competent foundation" therefor. The objection thus raised is a mere generality. It directs the attention of the court to no alleged defect in the deposition or in its certification. If counsel believed that any defect existed, or had in mind any reason why the deposition should not have been admitted, it was easy to disclose it; and, failing so to do, they are not in position to urge an exception to the ruling of the court in refusing to entertain it.

III. It is also said that the tenth paragraph of the charge of the court is incomplete, obscure, and misleading. This paragraph contains the oft-repeated instruction concerning testimony of alleged admissions by parties to the suit bearing upon the truth of the matters in controversy. We find nothing in it to justify the criticism of counsel. It states the rule in substantially the same form in which it

has often been approved by this and other courts. *Martin v. Algona*, 40 Iowa, 390; *Cooper v. Skeel*, 14 Iowa, 578; *Wilmer v. Farris*, 40 Iowa, 309; *Wallace v. Berger*, 14 Iowa, 183.

In the course of the trial the court, having ruled out or stricken certain testimony, orally admonished the jurors that such evidence must be given no consideration by them.

3. INSTRUCTIONS: This it is said was violation of the statute when not required to be in writing. requiring instructions to juries to be given in writing. The objection is without merit.

The statute has never been construed to require the court to reduce to writing all the admonitions which it may be proper to give a jury while a trial is in progress. Such a requirement would be absurd in conception and burdensome in practice. *State v. Bigelow*, 101 Iowa, 430.

IV. It appears that an item of \$6.83 for oats for which plaintiff sought recovery from defendant was either admitted or was proven without dispute on the trial. To avoid a new trial for the failure to allow this item defendant consented to have judgment go against him for the amount thereof, with an equitable apportionment of costs. Upon this consent the court did enter judgment in plaintiff's favor with costs to the amount of \$10. It is objected that defendant should have been taxed with all the costs. The point is not well taken. The contest between the parties centered almost wholly about the plaintiff's claim growing out of the land transaction. It was on this and on other items in no manner related to the seventeen and one-half bushels of oats that practically all of the costs were made; and to charge defendant with the costs made on these issues found in his favor simply because plaintiff was concededly entitled to recover this small claim would be grossly unjust. That it is proper to apportion the costs in such cases has long been settled by statute and universally practiced in the courts of this State. Of other objections, suggested but not argued, based on al-

4. APPORTION-
MENT OF
COSTS.

leged error in allowing leading questions to witnesses, we have to say after examining the record that no error is shown. The rules of law in this regard are too elementary to justify using the time or space required for their restatement or the citation of authorities.

It appears that the case was twice tried in the court below, with the result in each instance that the jury found the plaintiff not entitled to recover. The evidence is ample to sustain the verdict, the parties had a fair trial, and it is time for this litigation to cease.

The judgment of the district court is therefore *affirmed*.

C. W. ELSON, Receiver of the Bank of Lineville, v. GEORGE A. WRIGHT, Administrator of the Estate of F. S. Wasson, Deceased, Appellant.

Banks and banking: DOUBLE LIABILITY OF STOCKHOLDERS: ENFORCE-
1 MENT: PARTIES. An assessment in a receivership proceeding is the proper method for enforcing the double liability of a stockholder of an insolvent bank, but under the present statute to bind a stockholder by the assessment he must have been brought into the action, individually, prior to the assessment.

Same: EXPIRATION OF CHARTER: EFFECT. The expiration of a bank
2 charter does not operate to render stockholders thereafter liable for indebtedness simply as partners, but double liability under the statute continues, so far at least as the valid indebtedness created while the corporation had a legal existence is concerned.

Appeal from Wayne District Court.—HON. H. M. TOWNER,
Judge.

TUESDAY, JUNE 4, 1907.

ACTION by plaintiff as receiver of a bank to recover an assessment of 50 per cent. on stock belonging to the estate of which defendant is administrator; the liability

sought to be enforced being the double liability of stockholders in banks as provided by statute. Judgment for plaintiff on a directed verdict, from which defendant appeals.—*Reversed.*

Miles & Steele, for appellant.

Freeland & Carter and *R. L. Parrish*, for appellee.

McCLAIN, J.—The Bank of Lineville was incorporated in 1879, under the general banking laws of this State, in accordance with which its charter was to expire in twenty years. At the expiration of this period no steps were taken to reincorporate, but the bank continued to do business as a corporation under its original charter until in June, 1904, when under proceedings properly instituted, to which the bank and many of its stockholders became parties either by service of notice or by voluntary appearance, the plaintiff was appointed receiver. In October following the plaintiff applied to the court for an assessment of 50 per cent. on the capital stock of the bank under the double liability statute for the purpose of paying its debts, and this assessment was ordered and made. Defendant's intestate had died in 1901, owning thirty-two shares of capital stock of the bank, of the par value of \$100 each, and these shares of stock still belonged to the estate at the time the assessment on stockholders was made; but, so far as appears by this record, neither the defendant administrator nor any other person representing the estate had been notified of the proceedings under which the assessment was made. The contention for appellant is that the assessment on the stock belonging to the estate was invalid, first, because of want of notice to the proper representative of the estate of the proceeding for such assessment; and, second, because the bank had ceased to be a corporation by reason of the expiration of its charter, and no assessment on its stockholders as such could be lawfully made.

I. The double liability of stockholders in banks is provided for in section 9 of article 8 of the State Constitution, but the method of enforcing such liability is left to

1. BANKS AND
BANKING:
double liabil-
ity of stock-
holders: en-
forcement:
parties.

be determined by statute. There are similar constitutional provisions in other States, and the statutes with reference to the enforcement of the liability have been various. In the ab-

sence of any specific provision, the liability of the stockholder under a constitutional or statutory regulation making him liable for the debts of the corporation has sometimes been treated as an individual liability to the creditors to be enforced by a bill in equity brought by one creditor in behalf of all, against one stockholder or any number of them, with the right of the stockholder held liable in such a proceeding to have contribution against other stockholders similarly liable. *Erickson v. Nesmith*, 46 N. H. 372; *Wright v. McCormack*, 17 Ohio St. 86; *Umsted v. Buskirk*, 17 Ohio St. 114; *Palmer v. Woods*, 149 Ill. 146 (35 N. E. 1122). And under this general theory it was early held in New York cases that an unsatisfied judgment against the corporation was not even *prima facie* evidence of the liability of the stockholder. 2 Morawetz, Corporations (2d Ed.), section 887. But this view has not been assented to in other jurisdictions, and the validity of a judgment as showing the liability of the corporation as the basis of an action against a stockholder to enforce his individual liability has been held conclusive. 2 Morawetz, Corporations (2d Ed.), section 886. The individual liability of the stockholder under double liability provisions has been treated as analogous to his liability for unpaid assessments; and it is pointed out that, although there is a distinction between these two classes of liability, the one being by way of security to the creditor for the debts of the corporation, and the other a direct liability to the corporation itself, yet as to the methods of enforcement there is no reason for any substantial difference. The indebtedness of the corporation must be

established in either case, and can only be established by an action against the corporation itself. When such indebtedness has been established, and the inability of the corporation to satisfy it has been determined, then as to either class of stockholders' liabilities the receiver, representing the creditors as well as the corporation, may proceed against the stockholder, in the case of unpaid subscriptions, for the purpose of collecting a fund due to the corporation which ought to be paid over to satisfy the creditors, and in the case of the stockholders' double liability to collect a trust fund out of which the debts of the corporation are to be satisfied. In either case, in the very nature of things, the enforcement of the stockholders' liability must be predicated upon the ascertainment of the debts of the corporation and the proportionate amount to be levied on each stockholder to satisfy such indebtedness; and it is not necessary that the stockholder be individually a party to the receivership proceedings in which the indebtedness of the corporation is determined, and the amount of assessment to be collected is fixed. *Howarth v. Angle*, 162 N. Y. 179 (56 N. E. 489, 47 L. R. A. 725); *Howarth v. Lombard*, 175 Mass. 570 (56 N. E. 888, 49 L. R. A. 301); *King v. Cochran*, 76 Vt. 141 (56 Atl. 667, 104 Am. St. Rep. 922). In the New York case just cited it is said:

There is no substantial difference between the liability for an unpaid balance on a stock subscription, which is an express contract to take the stock and pay for it, and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied to perform the statutory conditions upon which stock may be owned. The fact that the former is the promise of a principal and the latter that of a surety does not affect the question. The express promise runs to the corporation, and may be enforced by it, while the implied promise runs to the creditors, and may, according to the common law of the State where it was made, be enforced for the benefit of

creditors by a receiver of the corporation appointed to wind up its affairs. The latter promise is not a part of the capital stock of the bank, but is a substitute, required by statute, for the personal liability of a partner at common law, and has the same object, which is the protection of creditors.

In the Massachusetts case the court says:

There is as much reason for holding the proceedings of the court binding upon absent stockholders in this part of the administration of the affairs of the corporation as in the collection of unpaid subscriptions. The primary fund and the secondary fund are both to be administered under the order of the court. The court, in making assessments for unpaid subscriptions, does not act merely as the representative of the directors, who might have made such an assessment, but by virtue of its general power to do all that is proper in settling the affairs of the corporation. These assessments are, in principle, like the assessments made by the court upon the members of insolvent mutual fire insurance companies under the laws of this commonwealth, which are binding upon the members to whom no actual notice is given.

And in the Vermont case, with reference to the enforcement against a stockholder in that State of an assessment made by a court in Washington, this language is used:

It is argued that the defendant is not bound by the proceedings in which the individual liability of the stockholders was determined in the State of Washington, because not a party to those proceedings, and that he can be made liable here only in a court where an accounting of the assets and indebtedness of the bank can be had. This calls for an inquiry to the effect to be given to the account taken and assessment made by the Washington court having jurisdiction of that matter. If these proceedings are an adjudication conclusive upon the defendant, the amount of his liability is ascertained, and a suit at law is the appropriate remedy. In *Hawkins v. Glenn*, 131 U. S. 319 (9 Sup. Ct. 739, 33 L. Ed. 184), an assessment ordered by a court

which had jurisdiction of the corporation was held binding upon stockholders residing in another State, although not made parties as individuals. It is said in that opinion that a stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member; that a decree against the corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting upon the corporation, necessarily binds its members in the absence of fraud; and that this is involved in the contract created in becoming a stockholder. It is true that the assessment sued upon in the case cited was on a subscription for stock, but we see no ground upon which the two liabilities can be distinguished, as regards the question under consideration; and other courts have held the same.

To the same effect, see *Gleen v. Liggett*, 135 U. S. 533 (10 Sup. Ct. 867, 34 L. Ed. 262); *Whitmore v. Oxford National Bank*, 176 U. S. 559 (20 Sup. Ct. 477, 44 L. Ed. 587); *Irons v. Manufacturers' National Bank*, (D. C.) 21 Fed. 197; *Wilson v. Book*, 13 Wash. 676 (43 Pac. 939). These cases all hold that the double liability of the stockholders under constitutional and statutory provisions is a contractual liability, and it is not different in its nature, therefore, from the liability under a stock subscription, although it is secondary rather than primary. Were such liability penal and not contractual, it could not be enforced as against stockholders residing in other States, but that it may be thus enforced is settled by the cases already cited.

If, as above suggested, the stockholders' double liability to creditors is to be worked out through a receivership proceeding in analogy to the proceedings to enforce assessments for unpaid stock, then the determination in the receivership proceedings that the corporation is insolvent, and that the stockholders must pay a specified percentage on their stock in order to satisfy the debts of the bank is conclusive; for it is well settled that in enforcing the payment of stock subscriptions the receiver may proceed against the

stockholder for the amount of the assessment, although such stockholder was not a party, except as represented by the corporation, to the proceedings in which the assessment was made. *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329 (16 Sup. Ct. 810, 40 L. Ed. 986); s. c., 83 Iowa, 430; *Langworthy v. Garding*, 74 Minn. 325 (77 N. W. 207); *Collins v. Welch*, 141 Mich. 676 (105 N. W. 31); *Great Western Telegraph Co. v. Gray*, 122 Ill. 630 (14 N. E. 214).

In some States the conclusiveness of the assessment in the receivership proceeding upon stockholders on account of their double liability has been sustained. See, *Howarth v. Lombard*, 175 Mass. 570 (56 N. E. 888, 49 L. R. A. 301), and *Kink v. Cochran*, 76 Vt. 141 (56 Atl. 667, 104 Am. St. Rep. 922). But in the recent New York case, already cited, it is said that while the double liability of the stockholders as well as their liability for unpaid subscriptions may be enforced by the receiver, the assessment in the receivership proceeding is not conclusive; and it is open to the stockholder, when sued by the receiver in another State on the assessment, to show that the corporation was not in fact insolvent, or that the amount of its indebtedness was not as found by the court appointing the receiver. *Howarth v. Angle*, 162 N. Y. 179 (56 N. E. 489, 47 L. R. A. 725). As will be hereafter pointed out, it is not necessary in the present case to determine which of these two rules should be followed in this State; for, according to either one, the assessment in the receivership proceeding is *prima facie* evidence of the insolvency of the corporation and the amount of the assessment which should be made upon the stockholders to meet its indebtedness, although the stockholder was not individually a party to the receivership proceeding.

With these general principles established, we proceed now to consider the legislation in this State, and the decisions of this Court applicable to the enforcement of the stockholders' double liability. The present provisions as to

double liability of stockholders in State banks are found in Code, section 1882, which is as follows:

All stockholders of savings and State banks shall be individually liable to the creditors of such corporation of which they are stockholders over and above the amount of stock by them held therein and any amount paid thereon, to an amount equal to their respective shares, for all its liabilities accruing while they remained such stockholders; and should any such association or corporation become insolvent, its stockholders may be severally compelled to pay such deficiency in proportion to the amount of stock owned by each not to exceed the extent of the additional liability hereby created. The assignee or receiver of any such corporation, or in case there is none, or of his failure or refusal to act, any creditor thereof, may maintain an action in equity to determine the liability of the stockholders, and the amount to which each creditor shall be entitled; and all parties interested shall be brought into court.

The significant provisions of this section, so far as they relate to the stockholders' liability are drawn from the Act of 1880 (Acts 18th General Assembly, c. 208), and it is evident that these provisions exclude the individual liability of the stockholder to the creditor. The statute does not contemplate that one creditor or any number of creditors except as they are represented by the assignee or receiver shall bring action against a stockholder for the debts of the bank, holding him to the full extent of his statutory liability and compelling him to seek relief against other stockholders by an action for contribution or otherwise. Each stockholder "may be severally compelled to pay" the debts of the bank not otherwise satisfied, "in proportion to the amount of stock owned by" him, "not to exceed the extent of the additional liability hereby created." This provision evidently contemplates some proceeding in which the amount of indebtedness of the bank shall be determined, and each stockholder shall be held liable only for his proportion as fixed by the amount of stock owned

by him as compared to the total amount of the stock of the bank. Any deficiency resulting from insolvency of other stockholders or inability to reach them because non-resident or otherwise is not to be thrown upon the stockholder who is solvent and may be reached. In carrying out this plan of enforcing the liability of the stockholders this court has held in *State v. Union Stockyards State Bank*, 103 Iowa, 549, a case in which it was sought to enforce double liability against stockholders, that a valid assessment could be made in a proceeding to which the stockholders individually were not parties, and that the receiver might recover judgment against the stockholder for the amount of such an assessment; and the court in a supplemental opinion on rehearing said:

We understand the rule to be, as to the appointment of a receiver and the making of such an assessment, that all matters that necessarily inhere in the orders by which such results are attained — that is, matters to be considered and determined in making the orders — are adjudicated and conclusively settled, except in so far as they be changed by vacation or modification in the receivership proceeding upon application of parties interested, whether stockholders or others. . . . It is urged to us that one of the district courts of the State has held — following the opinion in this case — that in an action on such an assessment the amount of recovery cannot be controverted. Such a holding is correct. It was one of the matters considered and determined in making the order of assessment, and, if erroneous, the error must be cured in the same proceeding.

In the original opinion, which was affirmed on rehearing, the case of *Lamar Insurance Co. v. Hildreth*, 55 Iowa, 248, is commented upon and distinguished by the suggestion that the assessment will serve only as a guide to the amount of recovery, but the quotation above made from the supplemental opinion on rehearing clearly shows that the court finally reached the conclusion that the *Hildreth* case must be overruled.

It may be said in passing that in *Lamar Insurance Co. v. Hildreth*, *supra*, the case of *Chandler v. Brown*, 77 Ill. 333, was cited and relied on as stating the Illinois rule, which would be controlling in determining the liability of the stockholder in this State when sued under the Illinois assessment. But *Chandler v. Brown* has since been explained by the Supreme Court of Illinois as only applicable to a suit brought by creditors on behalf of themselves and others similarly situated, and not to a case where a receiver has been appointed by a court of equity to collect the assets of the corporation for the benefit of its creditors. See *Great Western Telegraph Co. v. Gray*, 122 Ill. 630 (14 N. E. 214). So that the *Hildreth* case is in fact not in point, even if it had not been in effect squarely overruled in the *Stockyards Bank* case.

It is evident, therefore, that under the provisions of Code, section 1882, above quoted, which regulates the procedure for the enforcement of the stockholders' double liability, an assessment in a receivership proceeding is the proper method of enforcing such liability. The propriety of adopting this method is well suggested in *Wilson v. Book*, 13 Wash. 676 (43 Pac. 939), a case referred to in the *Stockyards Bank* case, *supra*, 103 Iowa, 559.

There is nothing in our Constitution which defines the method by which this liability shall be made available. Hence the method must be determined by the courts and their aim should be to prescribe one which will accomplish the object of the provision with the least inconvenience to the creditors, without unnecessary annoyance to the stockholders. A method which would allow a single creditor to maintain an action at law against one or more of the stockholders for his own benefit would be so unjust to other creditors, and might result in such annoyance to the stockholders, that only the most positive language would justify the courts in holding that the liability might be thus enforced. So to hold would enable one creditor to obtain more than his share of the fund which should be derived from this liability. Not only would such a holding allow a creditor to do this, but

under it a stockholder could be subjected to a separate suit at the instance of each one of the creditors of the corporation. The same case is referred to in other cases already cited in this opinion, and always with approval.

And see, also, to the same effect, *Coleman v. White*, 14 Wis. 700 (80 Am. Dec. 797); *Great Western Telegraph Co. v. Gray*, 122 Ill. 630 (14 N. E. 214); 2 Morse on Banking (3 Ed.), section 693.

Unless our Code section specifically requires that the stockholder be made party to the receivership proceeding, we think he would be bound thereby, so far as the amount of the assessment is concerned, although not directly a party, as he is in that respect concluded by the adjudication against the corporation. As is said in *Hawkins v. Glenn*, 131 U. S. 319, 329 (9 Sup. Ct. 739, 742, 33 L. Ed. 184): "A stockholder is so far an integral part of the corporation that in the view of the law he is privy to the proceedings touching the body of which he is a member." And in *King v. Cochran*, 76 Vt. 141 (56 Atl. 667, 104 Am. St. Rep. 922), this language is used with reference to enforcing the stockholders' double liability:

The law provides that each stockholder shall be liable equally and ratably for the obligation of the corporation to an amount equal to the amount of his stock in addition to the stock itself, and that, if the corporation becomes insolvent and a receiver is appointed, he shall pay to the receiver the amount of such liability when the same shall be ascertained and decreed by the court having jurisdiction of the case. The stockholder contracts with reference to these requirements when he takes his stock, and is as much bound by them as if they were incorporated in a written agreement bearing his signature. His agreement covers not only the liability, but the manner in which the extent of the liability shall be determined; and, when required to contribute in accordance with his undertaking, he cannot be permitted to question the conclusiveness of the proceeding.

So in *Howarth v. Lombard*, 175 Mass. 570 (56 N. E. 888, 49 L. R. A. 301), which is a case also discussing the stockholders' double liability, it is said:

The undertaking of the stockholders relates directly to the payment of amounts so to be ascertained. The ascertainment is like a common case of a judgment against a corporation, which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court, so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation.

We feel justified in saying that in the last opinion in the *Stockyards Bank* case this court was unequivocally committed to the doctrine represented by the Massachusetts and Vermont cases, just cited; that is, the rule which makes the assessment in the receivership proceeding conclusive as to the proportion which each stockholder must pay on account of his double liability, without regard to whether he is individually made a party in the receivership proceeding. While this result was not so unequivocally stated in the first opinion in that case as in the short opinion on rehearing, yet it was plainly suggested in the first opinion; and it seems to be of some significance that in reporting the section of the Code already cited for adoption by the Legislature three days after the opinion was filed the Senate Committee added the last sentence to the section as previously recommended by the Code Commissioners, in the following words: "All parties interested shall be brought into court." This language has not been noticed by counsel on either side of the present case, but we cannot reach a satisfactory conclusion without taking it into account. We find nothing in the history of the litigation in the *Stockyards Bank* case to indicate that

attention was specifically drawn to the necessity for making the stockholders individually parties, but we cannot escape the conclusion that the definite intention of the Legislature, in adding this sentence to the specific provisions as to how the double liability of stockholders in banks is to be enforced, intended that the stockholders on whom the assessment should be binding were to be brought into court before the assessment was made. Without this specific provision, the assessment would undoubtedly be binding upon the stockholders so far as it determined the proportionate liability of each, subject, of course, to any individual defense that any stockholder might have with reference to the payment of any assessment. But under this specific language we hold that to make the assessment binding upon him in this respect he must have been brought into the litigation before the assessment. The result is that the assessment in the case now before us was not binding upon the defendant.

II. In Code, section 1629, it is provided that: "Corporations whose charters expire by limitation . . . may nevertheless continue to act for the purpose of winding up their affairs." Whatever the fact may have

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been as to whether the officers of the bank continued to transact business after the expiration of its charter, it must be presumed that the lower court in the receivership proceeding determined the necessity of an assessment upon the stockholders, and the amount thereof, on the basis of the liability of the bank as a corporation, and the defendant cannot in this proceeding insist that the indebtedness for which he is sought to be held liable was indebtedness for which he was not liable to assessment as a stockholder. We do not attempt to determine the question whether the stockholders in a bank which continues to do business after the expiration of its charter can be held liable as stockholders for indebtedness contracted after the charter has expired. No such question is before us. The statute evidently contemplates a continuance of the liability of the stockholders

until the business of the corporation is wound up, at least so far as valid indebtedness has been contracted while the corporation has a legal existence. The receivership proceeding was incident to the winding up of the affairs of the corporation, and therefore it is wholly immaterial that it was instituted after the charter had expired. After the expiration of the charter the corporate existence continues for the purpose of discharging obligations and disposing of corporate property. *State v. Fogarty*, 105 Iowa, 32. After the expiration of its charter the corporation was still such *de facto*. *Miller's Adm'x v. Newburg Orrel Coal Co.*, 31 W. Va. 836 (8 S. E. 600, 13 Am. St. Rep. 903); *Central City Savings Bank v. Walker*, 66 N. Y. 424. It was not open to the stockholders to insist that they became on the expiration of the charter liable only as partners. The contention for appellant that the members of a corporate body, acting without legal authority, are liable only as partners, would be applicable in the case of a corporation defectively organized as well as in the case of a corporation acting beyond the limitations of its charter. But it is well settled that the members of a corporation defectively organized cannot insist that because of such defective organization they are partners only. *Foster v. Moulton*, 35 Minn. 458 (29 N. W. 155); *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67 (27 N. E. 596); *Heald v. Owen*, 79 Iowa, 23; *Seaton v. Grimm*, 110 Iowa, 145. The contention for appellant that he is to be held liable as a partner only, and not as a stockholder, under the statutory provision imposing double liability on stockholders in banks, is without support in the authorities.

For the reasons pointed out at the conclusion of the first division of this opinion, the judgment of the trial court must be reversed, and the case remanded.—*Reversed*.

JAMES M. CASTNER, Appellant, v. THE CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Costs: TAXATION AFTER OFFER TO CONFESS JUDGMENT. A plaintiff should not be taxed with defendant's costs after an offer to confess judgment which is refused, unless his recovery is less than the amount of the offer.

Appeal from Monroe District Court.—HON. ROBERT SLOAN, Judge.

WEDNESDAY, JUNE 5, 1907.

APPEAL from an order taxing certain costs to the plaintiff.—*Reversed.*

John T. Clarkson, for appellant.

T. B. Perry, for appellee.

SHERWIN, J.—This was a suit to recover damages caused by fire. Before a trial was had in the court below the defendant offered to confess judgment for the sum of \$351, which the plaintiff refused to accept, and the trial proceeded; the plaintiff obtaining a verdict and judgment therein for the sum of \$463. An appeal was taken to this court, and a reversal of the case was ordered unless the plaintiff should elect to accept \$300, with interest thereon from June 13, 1901, in full satisfaction of the judgment rendered in the district court. The plaintiff elected to accept the amount so named, and after the election was filed the defendant paid into court the sum of \$366 in satisfaction of said judgment. Afterwards the appellee herein filed a motion to retax the costs and to tax to the plaintiff all costs made in the case subsequent to the filing of the offer to con-

fess, and this motion was sustained. Section 3818 of the Code is as follows: "After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed. . . . If the plaintiff being present refuses to accept judgment for such sum in full of his demands in the action, . . . and on the trial does not recover more than was offered to be confessed, he shall pay the costs of the defendant incurred after the offer."

The appellant contends that, having recovered judgment for \$463 on the trial in the court below, he is not within the provisions of this statute, while the appellee contends that, the judgment having been reduced by this court, the statute applies; in other words, that the trial referred to in the statute relates to the final disposition of the case in this court in this particular instance. This question we do not find it necessary to determine at this time; for, if the appellee's contention be conceded, the order retaxing the costs in this case was erroneous. The judgment of this court was, in effect, that the plaintiff was entitled to \$300 and interest, and such sum constituted the measure of his recovery and the judgment which should be entered against him on *procedendo* in the court-below. This exceeds the amount which had been tendered, and, if the appellee's contention be true that the trial in this court fixes the status of the parties under this statute, it is clear that the plaintiff should not have been required to pay the costs of the defendant incurred after its offer to confess judgment. *Watts v. Lambertson*, 39 Iowa, 273.

The judgment of the district court taxing said costs to the appellant is therefore reversed.—*Reversed*.

WM. L. KISSICK and SARAH E. KISSICK v. J. B. BOLTON, C.
A. HOOVER AND BOLTON-HOOVER COAL COMPANY, Ap-
pellants.

Mines and mining: ROYALTIES: APPLICATION. A mining lease provided that the lessee should commence operations within one year and pay as rent a stipulated price per ton, but in case of failure to mine as agreed he should pay specified advance royalties for the first and second years and thereafter that royalties should amount to a specified sum each year. No coal was mined the first two years, but advance royalties were paid. *Held*, that the same should be applied on the royalties first actually earned thereafter, and not on the excess earned over the royalty guaranteed.

Appeal from Mahaska District Court.—HON. BYRON W.
PRESTON, Judge.

WEDNESDAY, JUNE 5, 1907.

ACTION for royalty alleged to be due under a mining lease. A demurrer to the petition was overruled, and, as defendants refused to plead over, judgment was entered as prayed. Defendants appeal.—*Reversed*.

John O. Malcolm, for appellants.

L. C. Blanchard and *Robt. Kissick*, for appellees.

LADD, J.—This appeal is from the ruling on a demurrer to the petition. It seems that J. B. Bolton and C. A. Hoover had contracted with plaintiffs for the coal underlying their lands "at and for the consideration of six and one-fourth cents per ton for all screen lump coal passing over one and one-fourth-inch screen or such as may be provided by law, and four and one-fourth cents per ton for mine run coal, which royalty shall be paid" monthly. They

agreed to "commence to take said coal from under said lands within one year from said date, and to begin to pay said royalty, but, in the event that for any reason the parties of the second part do not or cannot have said coal open and mining therefrom if such conditions should arise, they shall pay the party of the first part as advanced royalty for the first year \$250.00, second year \$300.00 and after the second year the second party guarantees that the royalty shall amount to as much as \$400.00 for each and every year during the life of this contract or until all minable coal is removed from said land." Subsequently this contract was assigned to the Bolton-Hoover Coal Company. No coal was mined from the leased premises during the first two years of the term. In the third year the royalties amounted to \$302.72 and in the fourth year to \$227.91 up to August 1, 1905. In addition to the "advance royalty" of \$250 for the first year and \$300 for the second year, the defendants have paid \$77.07 on royalties earned in the fourth year.

The defendants insist that the so-called "advanced royalty" of the first two years should be applied on royalties actually earned thereafter, and that plaintiffs are entitled to no further payments until these have been exhausted, save that the royalties earned after the first two years shall equal \$400 per annum; while the plaintiffs contend that they are to receive at least \$400 per annum after the first two years, and that the "advanced royalty" can be applied, if at all, only on the excess above said amount actually earned. The district court in overruling the demurrer construed the agreement to exact the actual payment, not only of the advanced royalties, but also of \$400 per annum after the first two years, regardless of the amount of coal which might be mined. There can be no doubt as to the meaning of the term "advanced royalty." It was employed with reference to a failure to take coal out in the years mentioned, and must have been intended as payment in advance for coal subsequently to be mined. "Advance" is defined in Webster's

Dictionary, "to furnish, as money, or other value before it becomes due or in aid of an enterprise; to supply beforehand"; and in the Century Dictionary as "a going beforehand; a furnishing of something before an equivalent is received; or in expectation of being reimbursed in some way."

See, also, *Hartje v. Collins*, 46 Pa. 273; *Laflin & Powder Co. v. Burkhardt*, 97 U. S. 117 (24 L. Ed. 973); *Nolan v. Bolton*, 25 Ga. 355; 1 Am. & Eng. Ency. of Law (2d Ed.), 355. The manifest intention of the parties was that the lessees should begin mining the coal the first year, but, in event this might not be done, the lessors were not to be delayed in the receipt of the income contemplated, and, to obviate this, royalties were to be advanced by the lessees. This much seems to be conceded, and the dispute whether such advances are to be applied on royalties earned in the years following, even though these do not exceed the \$400 per annum stipulated or on the excess over that sum only. The word "royalty," as employed in the contract, means the share of the profit reserved by the owner for permitting the removal of the coal and is in the nature of rent. 20 Am. & Eng. Ency. of Law (2d Ed.), 782; 24 Am. & Eng. Ency. of Law (2d Ed.), 1009; *Atty. General v. Mercer*, 8 App. Cases, 778; *Western Union Tel. Co. v. American Bell Telephone Co. (C. C.)*, 105 Fed. 687.

Now, the portion of the contract, following the stipulation with respect to "advanced royalty," does not relate to the payment of royalty as earned, but merely fixes the minimum amount for each year after the second year. The lessees do not guaranty that there shall still be paid plaintiff \$400 per year, but "that the royalty shall amount to as much as \$400.00 for each and every year during the life of this contract." If the royalty on the coal removed each year computed at six and one-fourth cents and four and one-fourth cents per ton amounts to \$400, the guaranty is complied with; if not, the lessees are bound to make up the difference. There is nothing in the contract, however, indicating when

the money paid in advance for the first two years shall be applied, nor that \$400 in royalty as stipulated shall be actually paid in each of the following years. In these circumstances the money advanced should be applied on the royalties first earned, and, if this be done, there was nothing due the plaintiffs when this action was begun. The royalties computed under the contract did not amount to \$400 during the third year, but under the guaranty defendants were obligated to pay that amount. This they had advanced during the two preceding years, and \$150 besides. In the fourth year the royalties amounted to \$227.91, and they had paid thereon \$77.07, which with the balance of the money advanced discharged the debt.

It follows that the district court erred in overruling demurrer, and the judgment is *reversed*.

SAM VEER VEER, Appellee, v. CHRIS MALONE and MARY A. MALONE, Appellants.

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Principal and agent: UNAUTHORIZED ACTS: RATIFICATION. One simply acting as a gratuitous agent in making occasional loans for another does not have authority to declare an obligation due and to commence foreclosure of a mortgage given to secure the same, solely on the ground that insurance furnished by the mortgagor was not satisfactory to him; and the institution of the foreclosure by the agent, with no showing of knowledge on the part of the mortgagee, cannot be construed as a ratification of the agent's act in rejecting the insurance.

Appeal from Mahaska District Court.—HON. B. W. PRESTON, Judge.

WEDNESDAY, JUNE 5, 1907.

ACTION upon two notes, and to foreclose a mortgage securing the same. Trial to the court, judgment and decree for plaintiff, and defendants appeal.—*Reversed*.

J. D. Bolton, D. C. Wagoner and L. C. Blanchard, for appellants.

Irving Johnson, for appellee.

DEEMER, J.—On January 17, 1906, defendants executed two notes to plaintiff, one for the sum of \$3,000. and the other for \$180., each due January 11, 1911, and drawing 6 per cent. interest. To secure these notes defendants also executed a mortgage upon certain real estate in Mahaska county containing the usual stipulations and covenants, and in addition thereto the following:

It is provided, however, that the said mortgagors shall, while any part of said principal or interest remains unpaid, pay all taxes on said mortgaged property before they become delinquent, *and they shall keep the buildings thereon insured to the satisfaction of the mortgagee*, and the policy payable, in case of loss, to the holder thereof, as his interest may then appear; and in case of his failure to comply with either of these provisions the holder hereof may, at his option, cause such tax to be paid and such insurance to be effected, and may thereupon add the amount so paid by him to the sum next falling due, and shall have the above rate of interest thereon from the time of payment until repaid. It is provided that, if said mortgagor shall fail to pay installments of principal and interest as they fall due, or neglect or refuse to pay the taxes or effect the insurance as above provided for, for more than 30 days, then the holder hereof may, at his option, without giving notice, consider the principal and interest and amounts paid by him for taxes and insurance on said premises due and payable, and may, without delay, proceed to foreclose this mortgage.

This mortgage was acknowledged January 27, 1906, and filed for record January 29th. This action was commenced March 30, 1906, and the allegation in the petition which is material to our present inquiry reads as follows:

Par. 5. That since the execution of said mortgage and note and the receipt of the money from this plaintiff,

defendants have failed, refused, and neglected to cause the buildings situated on the premises described in said mortgage to be insured to the satisfaction of the mortgagee, and that said failure, neglect and refusal have existed on the part of said defendants for more than thirty days prior to the filing of this foreclosure.

Defendants denied this allegation, and also denied that the notes were due. Upon these issues there was a trial to the court resulting in a judgment and decree as prayed.

It appears that plaintiff is a nonresident. One Bennett, who is a real estate and loan agent at Oskaloosa, was applied to by defendants, or one of them, for a loan, and he (Bennett) made out the papers in plaintiff's name, after consulting with one Balduff, who is a relative of plaintiff, and who occasionally did business for him in the way of making loans. It seems that there was an old mill building upon part of the mortgaged premises, and it was agreed when the loan was made that this should be insured for \$500. It seems that defendants insured this mill property for the sum of \$500 in March of the year 1906 in an assessment company, to which Balduff objected because he (Balduff) did not consider such insurance good. Suit was then commenced, and defendants made application for a policy in what is called an "old line company" on April 3d, and received a policy on April 4, 1906, which was canceled by this company on April 20th. Balduff directed this suit to be commenced through an attorney, Mr. Irving Johnson, upon the ground that he (Balduff) was dissatisfied with the insurance, that this was in good faith, and that in asserting his dissatisfaction he was acting for plaintiff. Balduff's authority to act for plaintiff, as shown by the record, is as follows: "Ans. I have not done very much. When he has a little money he wants to put out on interest, he has asked me to attend to it for him. I have loaned money for him for the last four or five years at different times out of his savings from his earnings. I have invested it in mortgages

for him without pay, just as a matter of friendship. Q. Acted as his agent? Ans. Yes, sir." After the suit was brought, and after the old line policy had been procured, one of the defendants' attorneys went with them to the attorney for the plaintiff, and the following transpired: "After notice had been served Mr. Malone, he came to see me, and told me the policy had been refused. I went with him to Mr. Johnson, who, I understood, represented the plaintiff, and Mr. Johnson said that Mr. Balduff absolutely refused to have policies that were issued by these mutual companies, but insisted that other insurance be obtained. I then said we would endeavor to get some other insurance, and went to see Mr. O'Hara, and obtained a policy in the Hartford Insurance Company, issued by the Underwriters' Agency. That policy was taken to Mr. Johnson, who in a very short time returned it, and said that the policy was satisfactory in every way to Mr. Balduff, but that it would not be accepted unless the costs and expenses of foreclosure would be paid. "Q. In this suit? Ans. Yes, sir; which included \$25. attorney fee. At that time I left the policy with Mr. Johnson, who brought it to me and gave it to me. I told him I would not accept it for Mr. Malone as the representative of Mr. Malone, but simply as custodian, and he went away and left it there."

We have already referred to the fact that this policy was canceled April 20th, but the exact reasons therefor are not stated. Balduff testified that he commenced this suit. Upon these facts we are to determine whether or not the notes were due when the action was commenced. The mortgage itself provides that the buildings shall be kept insured to the satisfaction of the mortgagee, and the parol testimony shows that there was to be a \$500. policy upon the mill. This was procured in a mutual assessment company before this action was commenced, but one Balduff refused to accept it because he did not like that kind of insurance. Balduff clearly expressed his dissatisfaction with the insurance

and demanded other insurance, and he said in his testimony that he commenced this suit or authorized it to be commenced. He also testified that he asserted his dissatisfaction for the plaintiff. Looking now to his authority, we find that, according to his own testimony, it was very limited. He seems to have been a gratuitous agent for plaintiff, and at times made loans for him. Under such limited authority, he surely had no authority, either express or implied, to exercise a matter of personal privilege for and on plaintiff's behalf. The right to accept or reject the insurance offered was manifestly personal to the mortgagee; and assuming, without deciding, that such right might be delegated to another, such delegation must be express or necessarily implied from the situation. So far as shown, plaintiff himself has never expressed any dissatisfaction with the insurance effected by defendants, and, without such dissatisfaction being shown, the agent, Balduff, had no authority to commence this suit. If it was brought without authority, or prematurely, plaintiff should not be permitted to recover.

But if it is argued that plaintiff ratified the act of his agent in expressing dissatisfaction by instituting this suit. To this proposition there are two answers. In the first place, the agent, Balduff, says that he, and not his principal, commenced the action, and there is no showing whatever that plaintiff has any knowledge even now that this suit is being conducted. Even were there a presumption of knowledge, it seems to be negatived by the agent, who testified that he had all the talk with the defendants, and that he (the agent) commenced this suit. In the second place, neither plaintiff nor his attorney was a witness in the case, and nothing appears regarding the commencement of the action, save as stated above. There can be no ratification without knowledge, and, where ratification is relied upon, this knowledge must be shown. That does not appear here. No one has attempted to testify that plaintiff himself was not satisfied with the insurance. All that appears in this connection is

that an agent without any authority in the premises was dissatisfied, and that he commenced the action for that reason. In our opinion, this is not sufficient to mature notes not due until January, 1911, save for the provision in the mortgage making them due if the buildings were not insured to the satisfaction of the mortgagee. *Hamilton v. Schlitz Co.*, 129 Iowa, 172, gives some support to the conclusions reached.

Plaintiff failed to show a right to maintain the action, and the judgment and decree must be and they are *reversed*.

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CATHERINE MCCARTHY v. JULIA COLTON, CHARLES MCCARTHY, ELLA THOMPSON and DANIEL MCCARTHY, Appellants.

Deeds: DELIVERY: EVIDENCE. The possession and recording of a
1 deed during the life of the grantor and unequivocal assertions of title thereunder will establish delivery of the instrument so as to pass title, as against random statements of the grantee that he claimed only a life interest in the property, made to those having no interest therein and to whom he was under no obligation to disclose his title.

Adverse possession: LIMITATION OF ACTIONS. Those desiring to
2 question the title of one in possession of land under a recorded deed conveying the fee must do so within the statutory period after his assertion of exclusive ownership is made.

Appeal from Louisa District Court.—HON. W. S. WITHROW, Judge.

TUESDAY, JULY 10, 1906.

REHEARING DENIED, THURSDAY, JUNE 6. 1907.

ACTION to have plaintiff's one-third interest in certain real estate established and set off to her in partition. Decree for plaintiff, and defendants appeal.—*Affirmed*.

Wilson & Wilson, and C. A. Carpenter, for appellants.

W. E. Blake, for appellee.

McCLAIN, C. J.— Plaintiff's claim to an undivided interest in the property, as widow of Daniel McCarthy, deceased, is predicated on fee-simple title in him under a warranty deed from his brother Charles, also deceased; while the defendants, his children, assert title under a will of Charles by which their father was given a life estate only with remainder in fee to them. The deed from Charles to Daniel was acknowledged in 1869 and was recorded by Daniel September 1, 1879. Charles made his will January 5, 1879, and died May 25, 1879. If therefore the deed was delivered prior to the death of Charles, then the plaintiff is entitled to dower in the property, while, if the deed was not so delivered, defendants are entitled to the entire property under the will. It is conceded that the possession of the deed by Daniel McCarthy at the time he placed it on record gives rise to a presumption of a delivery by the grantor Charles McCarthy during his lifetime, and the only questions argued as to the title of Daniel McCarthy, on which depends plaintiff's right to an interest therein by way of dower, are: (1) Whether the presumption as to delivery is negated by the declarations and conduct of the grantor and grantee, and (2) whether the grantor was in possession under claim of right or color of title for the statutory period.

I. Although the brothers Charles and Daniel lived together on the land in controversy as a farm after the acknowledging of the deed in 1869, and there is much uncertainty in the evidence as to which of them was claiming the title, we are reasonably satisfied that Daniel was not making any claim to the property as his own before 1879. His conduct and declarations were inconsistent with claim of ownership, and therefore inconsistent with any delivering of the deed to him before that

1. DEEDS: delivery: evidence.

time. He seems to have anticipated that in some way the farm was to belong to him and his children, but he certainly did not regard the title as fully vested in him. This seems also to have been the understanding of Charles. Such understanding is also indicated by the fact that in his will made in January, 1879, he devised a life estate to his brother's children. The fact that Daniel had remarried in 1871 and had some difficulty with his second wife, the plaintiff in this action (the defendants being children by his first wife), may account for the delay on the part of Charles to deliver the deed in pursuance of the intention with which it had been executed. But within a month after the making of the will, and two or three months before the death of Charles, Daniel visited him in Cincinnati, where he then resided, and there is nothing in the evidence necessarily inconsistent with the assumption that the deed was then delivered. It is true that he made known to his children the provisions of the will by which he had only a life estate, and they had the remainder; but he recorded the deed, and in 1880, 1895, and 1900 he executed mortgages on the land in which plaintiff joined and which were duly recorded, in which he asserted full and complete ownership by way of warranty of title. It appears that he allowed his children to believe that his only claim to the property was as life tenant under the will, and that in random conversations with persons who had no interest in the property, and to whom he was under no obligation to disclose his title, he asserted only a life estate. To one of the mortgagees he stated, when inquiry was made, that this deed was on record, but that his children seemed to think that it was not, and it was pleasanter for the family, perhaps, to have them think so. But we think that the possession and recording of the deed and these unequivocal assertions of title under it should not be swept away as evidentiary facts by mere declarations in random conversations with friends and neighbors. We are satisfied that there is sufficient evidence to warrant the con-

clusion that, before the death of Charles, the deed lawfully came into the possession of Daniel by delivery such as would pass the title. Any other conclusion would require the finding of an unlawful, even a criminal, act on the part of the father of defendants, and there is nothing to justify the belief that any such wrong was committed by him.

II. Much of what has been said is applicable to the issue as to adverse possession. Whatever may have been the nature of the possession of Daniel McCarthy, whether as tenant of Charles or his agent in renting the land to others, or as life tenant under the will, his acts in recording the deed and in executing mortgages as fee owner were unequivocal assertions of full ownership, and of these acts the defendants had record notice. The defendants could not treat the continued possession as an assertion of a right as life tenant. They were bound to know that their father was asserting the right to possession as owner in fee under his recorded deed, and, if they desired to question his title, they should have done so within the statutory period after such unequivocal assertion of full and exclusive ownership was made. Their father did not die until 1903, and we reach the conclusion that title had become perfect in him by adverse possession.

The decree establishing plaintiff's one-third interest in the property as widow and providing for partition is therefore *affirmed*.

J. O. McBRIDE, Appellee, v. FLEMING BAIR, Appellant.

Boundaries: LOCATION BY SURVEY: ACQUIESCENCE. Agreement to

- 1 abide by the result of a survey is immaterial to the establishment of a boundary line, where the parties have acquiesced in the location of a division fence constructed on the line located by the surveyor.

Boundaries: ACQUIESCENCE. Acquiescence in a defined division line

- 2 up to which adjoining owners have occupied and cultivated

their lands for more than ten years will fix the true boundary between them.

Easement: ADVERSE POSSESSION. Mere user of a right of way over
3 the land of another will not create a prescriptive right therein,
even though with consent of the owner; there must also be a
claim of right.

Prescription: EVIDENCE. Evidence tending merely to establish a
4 license to use a passageway is immaterial on the question of
a prescriptive right therein, but though not competent on the
issue of prescription its admission was without prejudice.

Appeal from Keokuk District Court.—HON. B. W. PRES-
TON, Judge.

THURSDAY, JUNE 6, 1907.

SUIT to enjoin defendant from the removal of a gate.
Decree was entered as prayed, from which defendant ap-
peals.—*Reversed.*

Stockman & Hamilton, for appellant.

C. M. Brown, for appellee.

LADD, J.—The plaintiff has been the owner of the southeast quarter of section eleven since 1861. One Cravens then owned the southwest quarter of the same section. They constructed a line fence between these quarters, which marked the boundary until 1903. In 1871 plaintiff purchased the northwest quarter of section 14, and in the same year constructed a passageway between it and the southeast quarter of section eleven, by erecting a fence about two rods long across the corner of Craven's land, and a twelve-foot gate from the supposed quarter section corner to this fence. Subsequently Cravens conveyed the southwest quarter of eleven to one Schotts, of whom the defendant acquired title about eighteen years ago. Throughout this period the defendant and his grantors have maintained the south half of the fence between the quarters in section eleven, and the

plaintiff the north half. The north half was a hedge, and, not being entirely satisfactory, plaintiff in 1903 contemplated the erection of a post and wire fence instead. Before doing so the line was surveyed, with the result that the existing fence was found to be two or three feet east of the line designated as the true boundary by the surveyor. The new fence was placed on the last line; defendant acquiescing therein. Soon thereafter, however, he caused the passageway to be closed by removing the diagonal fence and gate extending the fence between the sections to the north and south line. After plaintiff had replaced the passageway fence, and defendant had restored his fence, this action was begun, in which plaintiff asked that defendant be restrained from interfering with said passageway, and be directed to remove the posts and wire placed therein, obstructing the same.

I. As defendant acquiesced in the location of the new fence on the line designated by the surveyor, it is immaterial whether he agreed to abide the result of the survey or not.

1. **BOUNDARIES:**
location by
a survey:
acquiescence. He is not complaining of the line as so established. In so far as he was in any way connected with such survey, the sole purpose was to ascertain the true line between the quarters in section eleven; the section line not being mentioned. The plaintiff testified that in talking of building the new fence defendant said: "There was nothing to show where the line is. He says let us have a surveyor and get the corners. Let it go where it will." The defendant denies this; but, if true, it had no reference to the line between the sections, for the corners were to be located only for the purpose of establishing the north and south line.

2. **BOUNDARIES:**
acquiescence. Conceding the new fence to mark this, it does not follow that the east and west line is other than where the fence has marked the boundary for the twenty-five years last past. Indeed, plaintiff testified that "this other fence had been there for at least twenty-five years, so that the passageway was across Mr. Bair's

land." The fence between the southwest quarter of section eleven and the northwest quarter of section fourteen had been maintained for so long a time, and the respective quarters so occupied, that it must be accepted, under the doctrine announced in *Miller v. Mills County*, 111 Iowa, 654, and numerous cases since, as marking the true boundary between them.

II. The passageway, then, is across the defendant's land, even though the surveyor might have thought the quarter section corner somewhat south of the line established

8. EASEMENTS:
adverse pos-
session.

by long acquiescence, and the only remaining question is whether title thereto or an easement therein has been acquired by adverse possession. It had been maintained by plaintiff for thirty-three years, but, as we think, without claim of right or title. Under section 3004 of the Code, the use of an easement "cannot be admitted as evidence that the party claimed the easement as his right but the fact of adverse possession shall be established by evidence distinct from and independent of its use and that the party against whom the claim is made had express notice thereof." If the testimony of plaintiff concerning a conversation with Cravens be rejected because of his incompetency, then there is no evidence save of long use to establish the right of way by prescription. Undoubtedly, defendant and those under whom he claims knew of the use, but user and knowledge thereof is not enough. There must have been a claim of right, independent of user, of which defendant or those under whom he holds had express notice. *Friday v. Henah*, 113 Iowa, 425; *State v. Birmingham*, 74 Iowa, 408; *Shrimper v. Ry.*, 115 Iowa, 35. Aside from mere user, the record contains no evidence of any claim whatever to this passageway.

Plaintiff, when on the witness stand, testified that before buying the last quarter he asked Cravens, if he should buy it, he would let him have a passageway through, and that Cravens responded that he "would be glad to, as it

would prohibit stock from bothering him." This evidence

4. PRESCRIPTION: was objected to on the ground that, as Cravens
evidence. had departed this life, the witness was incompetent, under section 4604 of the Code. Without passing on the objection, it is to be observed that the evidence tended merely to show the granting of permission or license to cross the land, and there is nothing in the record to indicate that occupancy was by any other right. If the occupation was by virtue of this license, it was subject to revocation at any time, and plaintiff acquired no title. *Friday v. Henah, supra*; 14 Cyc. 1151.

We discover no ground for permitting plaintiff to continue in the occupancy of defendant's land against his will, and therefore must direct the dissolution of the injunction decreed by the district court.—*Reversed.*

THE WILLIAMS-ABBOTT ELECTRIC COMPANY, Appellant, v. MODEL ELECTRIC COMPANY, Appellee, and twelve other cases of like title.

Multiplicity of actions: SUITS ON ACCOUNT: BAR TO RECOVERY. The sale of goods although at different times and upon different orders, payment for all of which has matured, constitutes but a single demand and separate suits based upon each distinct order and sale cannot be maintained, although in itself a complete transaction; and a recovery upon one such order and sale is a bar to an action upon the other sales then due.

Appeal from Des Moines District Court.—HON. W. S. WITHELOW, Judge.

THURSDAY, JUNE 6, 1907.

THE opinion states the case.—*Affirmed.*

Seerley & Clark, for appellant.

Charles Wilner and Poor & Poor, for appellee.

WEAVER, C. J.—The plaintiff corporation is a dealer in electrical machinery and supplies at Cleveland, Ohio, and during the year 1905 made twenty sales of its goods to the defendant, a corporation doing business at Burlington, Iowa. The goods thus sold included a very large number of items, and aggregated in value something more than \$1,000. The bills of the several sales ranged in amount from seventy-three cents to \$176.25; four of them being for amounts in excess of \$100. The precise terms upon which this business was done are a matter of some controversy, but it seems to be fairly well established that an understanding existed by which the goods were to be furnished on “regular terms” or “regular 30-day terms” or “30 days net.” These phrases are said to mean that the buyer is entitled to thirty days’ credit, subject to an agreed discount if paid within ten days from date of the invoice. The plaintiff entered the several sales upon its books of account after the ordinary manner of merchants and dealers. The account with the defendant was opened in June, 1904, and, at the end of that year having several items upon both the debit and credit sides, it was balanced and a small debit balance carried into the account for 1905. At different times during the latter year plaintiff made and sent to defendant different statements of account. The last of these statements was sent after all the sales in controversy were made. It shows in separate items the sales for each calendar month and their aggregate of \$1,008.66, with several credit items, leaving a balance against the defendant of \$992.71. About this time some controversy arose between the parties over alleged infringements by plaintiff upon a certain patent which defendant claimed to own or control. Thereafter the plaintiff divided its claim or claims into fourteen separate parts, and brought thereon fourteen separate suits in the court of a justice of the peace. In some of these actions two or more of the smaller bills aggregating

less than \$100 were united, and, where a sale made upon a single order aggregated more than \$100, the items thereof were divided into parts of less than \$100, and each made the subject of a separate suit. One of the actions thus brought was carried to judgment in favor of plaintiff for \$45, and this judgment was pleaded by the defendant as a bar to the recovery by the plaintiff in each of the other actions. The justice of the peace found for the plaintiff, and entered judgment against the defendant for the amount claimed in each of the contested cases, and from the judgment in each case the defendant appealed to the district court. In the district court plaintiff amended its petition, in each case alleging, in substance, that the several sales were made upon special contracts or orders, and not upon account, and that each was made upon a credit of thirty days, and were therefore each properly the subject of a separate action. The defendant also amended its answer, alleging that on August 1, 1905, the plaintiff stated its account with defendant in writing, and sent the same by mail to the defendant at Burlington, Iowa, where it was duly received, and that by said statement all the sales in controversy were set forth in a single account and consolidated into a single charge, from which the aggregate of its credits was deducted, showing the balance stated as due from defendant to plaintiff to be \$992.71, to the correctness of which the defendant assented and never at any time objected. Defendant further alleged that, for the fraudulent purpose of making it appear that said single demand of \$992.71 was within the jurisdiction of a justice of the peace, the plaintiff wrongfully and fraudulently divided the same into 14 parts, thus making a division of several bills each for more than \$100 for goods furnished the plaintiff at one time and upon a single order or request, and upon these separate parts or portions of the account brought fourteen separate suits against the defendant, in each of which said plaintiff recovered judgment. Defendant further alleges in each of said thirteen cases in which

appeal had been taken the cause of action upon which plaintiff demands a recovery is part of a legally indivisible cause of action for more than \$100, and is therefore not subject to the jurisdiction of a justice of the peace, and for this reason such action should be dismissed at the plaintiff's costs. The issues in the several actions were tried to the district court without a jury. After hearing the evidence the court found for defendant, dismissed the several actions, and in each case entered judgment against the plaintiff for costs. From said judgments appeals have been taken to this court.

The foregoing statement sufficiently recites the material facts, and we turn at once to the single question of law involved therein. The proposition that a continuous book account is entire, and cannot without agreement of the parties be split into separate and distinct demands to form a basis for several suits, is one which has general recognition by the authorities, and is no longer open to question. *Guernsey v. Carver*, 8 Wend. (N. Y.), 492 (24 Am. Dec. 60); *Buck v. Wilson*, 113 Pa. 423 (6 Atl. 97) *Pinney v. Barnes*, 17 Conn. 420; *Bendernagle v. Cocks*, 19 Wend. (N. Y.), 207; *Field v. Major*, 6 N. Y. 180 (57 Am. Dec. 435); *Borgesser v. Harrison*, 12 Wis. 548 (78 Am. Dec. 757). These authorities uphold the contention that an account consisting of one or more items, all of which are due and payable, constitutes but one demand, and if the party to whom the same is due sees fit to bring suit for a part thereof and recovers judgment, such recovery will be a bar to further suit upon the remainder of the claim. In the *Guernsey* case, above cited, the plaintiff had an account against the defendant consisting of twenty different articles delivered on fourteen different days amounting to about \$6. He commenced suit against the defendant, setting up a part of the items charged, and the suit so brought was prosecuted to judgment. Thereafter he brought a suit to recover for the remaining items, and the judgment in the first suit was pleaded in bar. The trial court held that, as the several items rep-

resented distinct sales, separate suits might be maintained on each separate delivery. On appeal the judgment of the trial court was reversed in an opinion by Nelson, J., who says: "The whole amount being due when suit was brought, it should be viewed in the light of an entire demand, and incapable of division for the purpose of prosecution. The law abhors a multiplicity of suits. According to the doctrine of the court below, a suit might be sustained after the whole became due upon each separate item delivered, and, if any division of the account is allowable, it must no doubt be carried to that extent. Such doctrine would encourage intolerable oppression upon debtors and be a just reproach upon the law. The only just and safe rule is to compel the plaintiff on an account like the present to include the whole, if due, in a single suit."

It is the theory of the appellant that, because the goods sold to the defendant were furnished at different times and upon different orders, each transaction supports an independent cause of action, and that the mere entry of the several items or sales in a single account has no effect to deprive such sales of their independent character, or require that they should be prosecuted in a single action. Some cases are cited apparently holding to the doctrine thus stated, but in our judgment they are not sustained by the weight of authority or by the better reason. We see nothing in the present case to distinguish it from the ordinary case between the wholesale dealer and the retail merchant involving an account for goods sold from time to time. In the very nature of things, these accounts are made up of sales made on different dates for varying amounts, and, though each transaction is complete in itself, yet the account into which these items are carried is one, and the varying balance from time to time represents the demand for which right of recovery exists. If it were otherwise, then, after an account has run for an extended period and embraces scores and perhaps hundreds of items each representing a distinct sale and each and

all due and payable, the seller could maintain as many different suits as there are distinct items in his demand. Such result would be so oppressive, and open the door to such manifest abuse, that it should not have the approval of a court of justice.

The fact that the sales may have been made on a credit of thirty days does not alter the aspect of the question here presented. Such terms of sale would, of course, have the effect to make the charges mature at different times, and action would not lie on any such item until the term of credit had expired. In bringing suit upon an account based upon sales of this character, the plaintiff would not be required to include therein those which were not yet due according to the terms of sale; but, in so far as the items charged for were due and payable, they would constitute a single demand for the same reason and on the same principle which applies to accounts based upon sales without any special agreement with reference to time or credit. In *Buck v. Wilson, supra*, the Pennsylvania court had to deal with a question identical with the one now before us, in the fact that the several sales, the charges for which constituted the account sued upon, had been made each on thirty days' credit. After the entire account was due plaintiff brought action, and recovered judgment upon several of these items. Thereafter he brought another action upon the remainder, and the judgment in the former case was pleaded in bar of his recovery. The court held the defense good, and plaintiff was defeated.

This rule is not applied to open accounts only. If A. makes and delivers to B. his promissory note payable in five yearly installments, a right of action accrues to B. upon each installment as it falls due, and he may maintain five successive suits thereon as the several payments mature, if he so elects, but, if he neglects to sue until all such installments have matured, he cannot bring five separate and distinct suits upon the note, but must prosecute his demand in a single proceeding if he would avoid the effect of the rule to which

we have referred. Again, if a promissory note be drawn payable ten years after date, with interest at a given rate, payable thereon semiannually, action may be maintained for the recovery of each semiannual installment of interest as it falls due, but, if no suit be brought and no interest be paid on the note until it becomes due, we think there is no rule of law which would permit the holder to bring one action for the recovery of the principal and twenty other different actions for the recovery of the several unpaid installments of interest. The law is intended to secure the citizen in the enjoyment of his personal and property rights and to afford him a fair remedy when those rights are infringed; but it is careful to see that the remedies thus provided are not perverted into means of injustice and oppression. Nor is it necessary to the application of the rule that the items charged in the account should be all of the same nature or that the several sales upon which they are based should be made under or pursuant to a single contract. In *Stevens v. Lockwood*, 13 Wend. (N. Y.), 644 (28 Am. Dec. 492), the plaintiff brought suit against the defendant upon an account or series of items made up of charges for money advanced, for house rent, for labor, for wood, and for other items, making a total of \$123.46. Before the case was submitted, the plaintiff withdrew from his claim part of the items therein charged, and recovered a judgment upon the remainder. Thereafter he brought another suit upon the items so withdrawn from the former demand. It was held that the former recovery was a bar to the second action. The court there says that the "rule laid down in *Guernsey v. Carver* is in accordance with *Markham v. Middleton*, 2 Str. 1259, and with good sense, and is not opposed at all to the principle in *Phillips v. Berick*, 16 Johns. 136 (8 Am. Dec. 299). It is applicable to this case, for, although this is not a merchant's account, it is one continuous account, and in the meaning of the preceding cases indivisible, and one suit and only one should be sustained. Upon a contrary prin-

ciple a separate suit might be brought for every separate item of the account, and 20 or more might be brought where only one was necessary." The line of distinction between cases where the rule applies and cases in which separate actions may be maintained is not always well defined, and there is some lack of harmony in precedents, but, according to our view, the sounder principle and the better reasoning sustains the conclusion reached by the trial court in this case.

We find no reversible error in the record, and the judgment of the district court is therefore *affirmed*.

FRANK SAVOIE, Appellant, v. CHARLES SAVOIE ET AL., Appellees.

Estoppel: EVIDENCE. In an action for partition brought by one devisee against another the evidence is held to estop plaintiff from asserting any interest in lands devised to defendant, by reason of a prior mutual release or waiver of such interest, even though they may not have fully understood just what interest each held in the property devised to the other.

Appeal from Alamakee District Court.—HON. L. E. FELLOWS, Judge.

THURSDAY, JUNE 6, 1907.

THE opinion states the case.—*Affirmed*.

E. W. Cutting, for appellant.

Dayton & Dayton, for appellees.

WEAVER, C. J.—This action was brought in equity for the partition of certain lots in the city of Waukon. Plaintiff asserts ownership of a one-sixth interest in the property derived as follows: On April 29, 1903, one Joseph Savoie died testate seised in fee of the lots above mentioned, which

were occupied by him as a homestead, also of another lot described as lot 4, in block 31. So far as it appears from the record, these two parcels constituted the bulk of the testator's estate. By the terms of his will he (1) provided for the payment of his debts; (2) gave his wife a life estate in all his property; (3) gave the remainder in lot 4 above mentioned to his son Frank, who is plaintiff herein; and (4) subject to his debts and the life estate to the widow, gave his homestead lots to his son Charles, who is defendant herein. These parties, it should be said, are the only heirs at law of Joseph Savoie. On June 19, 1903, the widow of Joseph Savoie died intestate. On the theory that the widow, in addition to the life estate given her by the will, was entitled under the law to one-third in fee of the real estate of which Joseph Savoie died seised, and that upon the death of the widow this portion descended in equal shares to her two sons, plaintiff bottoms his claim to a one-sixth part of the homestead lots, for a partition of which he has instituted these proceedings.

By their answer defendants admit the descent of title substantially as claimed by the plaintiff; but, by way of estoppel and avoidance of any claim of right by the latter in said homestead property, they allege that they held large claims against the estate of Joseph Savoie and the estate of his widow, Sarah Savoie, and that, after the death of the latter, the plaintiff, Frank Savoie, being desirous to sell or mortgage lot 4, in block 31, which had been devised to him by his father, and finding the unsettled condition of said estates prevented his giving a clear and satisfactory title, requested defendants to convey to him their interest (derived through the mother) in said lot 4, and to relinquish their claims against said estates, and promised that in consideration of such conveyance and relinquishment on their part he would accept the undivided title to said lot, in full satisfaction and discharge of all his claims in and to the estates and properties left by the said Joseph Savoie and Sarah Savoie. They allege that they accepted this proposition, and in pur-

suance of such agreement did convey to the plaintiff all their interest in said lot 4, and relinquished their claims against the said estates, and thereby perfected in plaintiff the title to said property, and that thereby plaintiff became and is estopped to have or claim any right or interest in the homestead. By cross-petition defendants ask to have their title in the last-mentioned property quieted in themselves. The trial court found the equities to be with the defendant, and plaintiff appeals.

While the evidence is conflicting, it fairly preponderates in support of the appellees claim that, after the death of both of the parents, appellant was desirous of realizing by sale or mortgage upon the property devised to him by his father's will. It is very probable that neither Frank nor Charles at this time fully understood that their titles to their respective lots were not wholly derived from their father's will, or that either had any share in the title to the lot devised to the other, and, when the agent who negotiated the loan required a quitclaim from Charles to Frank before closing the loan to the latter, it may be doubted whether they fully comprehended the reason for the demand. But it is shown with reasonable degree of certainty that they did understand that the estates of their deceased parents were not yet fully settled, and that a settlement of their respective rights in the property was desirable to avoid any future trouble or conflict of interests. We shall not detail the evidence bearing upon the question, but will say that it fairly well supports the conclusion of the trial court that appellant did accept the conveyance from Charles in full satisfaction of all his claims upon the property left by their deceased parents. They may not have fully understood just what right each held in the property devised to the other, but that they intended a mutual release or waiver is fully established. It is hardly conceivable that Charles should have released without consideration a one-sixth interest in the lot held by Frank, and at the same time permit the latter to retain a like interest in

the homestead property held by himself without request or demand for a release thereof. Even if both were ignorant of the true situation in this respect, a court of equity would be very slow to allow the appellant to thus secure his own portion, free from the claim of his brother, and at the same time insist upon a share in the portion of the latter. He should not be permitted to profit by his discovery of their common mistake of law and fact, to the injury of the brother, whom he had procured to relinquish a valuable right. He who asks equity should show his willingness to deal equitably. *Baker v. Massey*, 50 Iowa, 403.

We are satisfied that the decree of the trial court effects substantial justice, and it is *affirmed*.

J. O. WEST, Appellee, v. W. M. FRY, Appellant.

Reference of causes: REVIEW OF ORDER. Objection to the reference
1 of a cause for trial, which does not involve a jurisdictional question, cannot be raised on appeal, where the parties took no exception to the reference and appeared and tried the case before the referee.

Limitation of actions: MISTAKE. The statute of limitations runs
2 against an action arising from a mistake of the parties from the time the mistake might, in the exercise of ordinary diligence, have been discovered.

Appeal from Marion District Court.—HON. JAMES GAMBLE,
Judge.

THURSDAY, JUNE 6, 1907.

ACTION to recover for corn sold and delivered, for use of a farm and for damages thereto, and upon an account for hay. Defendant denied generally, and pleaded a counter-claim upon an account of forty-nine items covering the years 1888 to 1901, which account showed twenty-one items of

credit. Plaintiff, in reply, admitted a partnership relation between the parties for the years 1888 to 1890, claimed additional credits to those shown by defendant, also a full settlement of defendant's account, and the Statute of Limitations. Upon its own motion, and without objection or exception by either party, the trial court sent the case to Mr. Sam D. Woods, as referee, who proceeded to hear and try the same, and to make his report back to the court. Motions to confirm and to set aside were filed, and the District Court sustained plaintiff's motion to confirm, except as to one item, and overruled defendant's to set aside.—*Affirmed*.

Hays & Amos, for appellant.

L. D. Teter and *Geo. W. Crozier*, for appellee.

DEEMER, J.—As there was no objection or exception to the reference made by the court, and as both parties appeared and tried the case before the referee, and at no time made any objection to his hearing the matter, appellant is in no position to question the order made. In this respect the case comes to us on error, and without objection to the court's ruling in sending the case to a referee, there is nothing to present. *Wies v. Morris Bros.*, 102 Iowa, 332. The objection does not go to the jurisdiction of the court or of the referee, for even a law action may be tried to a referee by consent. Moreover, a partnership between the parties was admitted, and an adjustment of the accounts thereof was asked.

Among other things, the referee found, in substance, the following facts: "That on October 7, 1890, the plaintiff signed defendant's name to a check for \$196.20, drawn on defendant's bank account, and received the money therefor. This was for a car of corn which plaintiff had purchased for the defendant. Some days thereafter, the defendant, not knowing of the drawing

1. REFERENCE OF
CAUSE: re-
view of order.

2. LIMITATION OF
ACTIONS: mis-
take.

of the said check, again paid the plaintiff the said amount. It is not charged that there was any fraud on the part of the plaintiff in this matter, or that he willfully concealed the fact that he had drawn this check from the defendant. These parties were brothers-in-law, engaged in business transactions together, and a relation of trust and confidence existed between them, as shown by the fact that plaintiff checked upon the defendant's bank account. This transaction was merely a mistake between the parties; the defendant supposing he was paying a debt due the plaintiff, and the plaintiff, through inadvertence, and mistake, neglected to apprise the plaintiff, or had forgotten that he had received payment for this corn."

The referee allowed defendant this item, but the trial court disallowed it, and rendered judgment for plaintiff in the sum of \$363.68. Defendant makes the following contention with reference to the item in dispute: "Where a pure mistake has occurred between parties, and one holds a claim against the other arising therefrom, does the Statute of Limitations commence to run from the time of the actual discovery of the mistake, or from the time when, in the exercise of reasonable diligence, the party holding the claim should have discovered such mistake?" Code, section 3448, provides that, in actions for relief on the ground of fraud or mistake, the cause of action shall not be deemed to have accrued until the fraud or mistake complained of shall have been discovered by the party aggrieved. With reference to the mistake here relied upon, the referee found that defendant in the exercise of due diligence might have, and ought to have, had knowledge of this double payment within five years after the time he asked to recover thereon; that, had he exercised ordinary care usual in such matters, he would have discovered the mistake; and that in the exercise of such care he might in a few days after making the double payment have discovered the mistake. The evidence is not before us, and the case is submitted by both parties upon the findings of fact made by the referee. This must be accepted

as final, and the question presented by appellant must be determined in the light of these facts. The last check was made October 8, 1890. As neither party has anything to say regarding the applicability of section 3447, we do not consider that section in its possible bearings upon this case. The referee allowed this item to defendant, and the trial court disallowed it. By the uniform holdings of this court, the mistake referred to in the section quoted is not such as was heretofore solely cognizable in a court of chancery. *Baird v. Railroad*, 111 Iowa, 627; *Higgins v. Mendenhall*, 42 Iowa, 675; *McGinnis v. Hunt*, 47 Iowa, 668.

Although some support is to be found for plaintiffs contention that the action is not for relief on the ground of mistake (*Ind. Dist. v. Ind. Dist.*, 123 Iowa, 455), we shall, for the purpose of this inquiry, treat the case as one for such relief, and the only other question is: Was defendant guilty of such negligence as precludes him from recovering the amount paid? While we have no cases exactly in point, it is at least assumed, if not decided, in *Cole v. Bank*, 114 Iowa, 632, that the statute begins to run, in cases where the action is for relief on the ground of mistake, from the time when the mistake might in the exercise of ordinary diligence have been discovered. See, also, *Humphreys v. Mattoon*, 43 Iowa, 556. In this respect there is no difference in the statute between fraud and mistake, and it has frequently been held that, where the action is for relief on the ground of fraud, the statute begins to run from the time when the fraud might by the use of ordinary diligence have been discovered. *Humphreys v. Mattoon*, *supra*; *Nash v. Stevens*, 96 Iowa, 616; *Shreves v. Leonard*, 56 Iowa, 74. Plaintiff did nothing to conceal the facts from defendant, or to lull him into security, as in some of the cases cited by appellant, and the sole question here is the effect of defendant's negligence. No matter whether his action be for fraud, for mistake, or to recover for money had and received, it seems to be barred under the findings of the referee, and the trial court was

justified in denying this item in passing upon and reviewing the report of the referee. If we are to follow the rule apparently announced in the *Independent Dist.* case *supra*, and hold that the action is not for mistake, but for money had and received, the same result must follow.

The order and judgment of the district court are correct, and they are *affirmed*.

RUSTLER REALTY COMPANY, Appellant, v. CHARLES
SWECKER, Appellee.

Accord and satisfaction: EVIDENCE. To constitute a valid accord and satisfaction it must appear that the debtor gave the amount in complete satisfaction of the debt and that the creditor accepted it as such. Under the evidence in the instance case a directed verdict was not warranted.

Appeal from Poweshiek District Court.—HON. JOHN T.
SCOTT, Judge.

THURSDAY, JUNE 6, 1907.

ACTION at law to recover a balance due as commission earned in making a sale of real estate. There was a directed verdict, and judgment for costs in favor of defendant, and the plaintiff company appeals.—*Reversed*.

Popham & Havner, for appellant.

Tom H. Milner, for appellee.

BISHOP, J.—The employment of the plaintiff company by the defendant to find a customer for his farm is conceded. It is also conceded that the farm was sold to a customer produced by plaintiff, and on the terms stipulated for by defendant. The parties are disputing only as to the amount

of the commission which should be paid by defendant. The plaintiff alleged an oral agreement on the subject, made at the time the farm was listed with it for sale, whereby defendant promised to pay the sum of \$447, if a purchaser satisfactory to him should be produced; that of said sum there had been paid the sum of \$228, and the prayer was for judgment for the balance. Defendant, on the other hand, denied that the agreement was as claimed by plaintiff, and he pleaded that plaintiff undertook the service on the express understanding that the commission should be a sum equal to 1 per cent. of the sale price of the farm; that this amounted to \$228, which was paid on the completion of the sale. As a separate defense, defendant further pleaded that, following the completion of the sale of the farm, a dispute arose between himself and plaintiff in respect of the agreement for commission, and the amount to be paid plaintiff. And the allegation follows that defendant tendered to plaintiff \$228, which sum was accepted, and which plaintiff still retains. Accordingly, it is said that the subject-matter of this suit was thereby settled, and it was demanded that plaintiff's petition should be dismissed. Plaintiff replied, saying that the said sum of \$228 was not accepted in full satisfaction, and was not so understood, but was taken to apply on the contract sum as claimed by it to be due and not otherwise.

On the trial, the evidence as to the amount agreed to be paid as commission was in direct conflict. So far, therefore, there was a fair question for submission to the jury. But, apparently, the trial court was of the opinion that the defense of accord and satisfaction had been completely made out, and hence that the case should be disposed of by a directed verdict. Our reading of the record does not lead to such conclusion. When the sale had been completed, the parties met in a bank at Marengo, and defendant handed to Colson, one of the members of the plaintiff company, a bank memorandum showing that there had been deposited in said bank to his credit the sum of \$228. Colson refused to accept that

amount as in full, and after some discussion the parties separated; Colson insisting upon payment of \$447, and the defendant refusing to pay more than \$228. Plaintiff at once commenced suit to recover the sum claimed by it. On finding out about a week later that the deposit by defendant still stood to his credit, and this without any conditions attached, Colson went to the bank, drew out the money, and appropriated it to the purposes of the plaintiff's company. These in brief are the facts disclosed, and in our view it was error to hold as matter of law that such were sufficient to make out a case of accord and satisfaction. "To constitute a valid accord and satisfaction, not only must it be shown that the debtor gave the amount in satisfaction, but that it was accepted by the creditor as such." *Perin v. Cathcart*, 115 Iowa, 553. And if the evidence on the subject be such as to give rise to doubt, the case should be submitted for a verdict.

For the reasons pointed out, a new trial must be ordered.

To that end the judgment is *reversed*.

T. J. MULLIN, v. IRA WHITE and JAMES HUDSON ET AL.,
Appellants.

134	681
d142	224

Estates of decedents: SALE OF REAL ESTATE: INTERESTED PARTIES:
NOTICE: COLLATERAL ATTACK. The creditor of an heir holding an attachment lien upon his interest in real estate belonging to the estate is an interested party, and entitled to notice of an application by the administrator for an order to sell the real estate to pay debts; and if an order of sale is made without notice to him his lien is not displaced, and he may attack the proceeding in a collateral action to enforce his lien against the land in the hands of the purchaser.

Appeal from Keokuk District Court.—HON. BYRON W.
PRESTON, Judge.

THURSDAY, JUNE 6, 1907.

SUIT in equity to subject real estate to the payment of a judgment. There was a decree for the plaintiff, from which the defendants appeal.—*Affirmed.*

J. D. Butler, for appellants.

J. M. Dower and Saunders & Stewart, for appellee.

SHERWIN, J.—Hannah Bigley died intestate in Keokuk county, Iowa, about August 1, 1903, leaving surviving her a husband, Patrick Bigley, and collateral heirs, among whom was Michael McGurk, who by reason of the death of said intestate became the undivided owner of a moiety of intestate's real estate. August 17, 1903, the plaintiff herein commenced suit against Michael McGurk in the district court of Keokuk county, Iowa, and caused a writ of attachment to issue therein and be levied upon an undivided one-sixth interest in the real estate of which said Hannah Bigley died seised as the interest of said Michael McGurk therein. The writ was levied August 17, 1903, notice thereof duly served, return made, and the proceeding duly entered upon the incumbrance book of said court. At the December, 1903, term of said court, the case was transferred to the district court of Pottawattamie county for trial, the transfer being made upon the application of McGurk, who claims to reside in said county. Pursuant to this order, a transcript of the proceeding was sent to that court, and a record of the transfer was duly made in the Keokuk county court. The plaintiff obtained a judgment against McGurk at the May term, 1905. Thereafter a transcript of the proceedings in the Pottawattamie court was duly filed in the Keokuk county court. On August 12, 1903, an administrator of the estate of Hannah Bigley was duly appointed and qualified. At the December, 1903, term of the District Court of Keokuk county said ad-

ministrator filed his application for an order authorizing him to sell all the real estate of said decedent for the purpose of paying debts of the estate and the expenses of the administration thereof, and on the 2d day of March, 1904, the court made an order directing and authorizing said administrator to sell all of the real estate of said decedent. In July, 1904, the administrator filed his report showing a sale of the land to the defendant, Ira White, and on the same day the district court approved said sale and ordered a conveyance of said premises to be made to the purchaser. The conveyance was thereafter executed and approved by the court, and a complete record thereof made. No notice of any kind of the application to sell the real estate was given to the plaintiff, and it is upon the failure to give such notice that he bases his contention that the order of sale was a nullity as to him. This action was thereafter commenced; the plaintiff filing a petition in two counts, the first count of which it is unnecessary to more particularly notice. The second count of the petition recognizes the administrator's sale and the claims against the estate, and the pro rata share thereof with which McGurk's interest was burdened, and asked that a special execution issue against the interest of McGurk in the real estate subject to his share of the charge against the entire estate, and that his judgment be declared a lien superior to the title of the defendant. This relief was granted; the court finding that McGurk's one-sixth interest in the estate was subject to a charge thereon amounting to \$452.60, said amount being a pro rata share of the debts and charges against said one-sixth interest.

The appellants contend that, although no notice of the application to sell was given to the plaintiff herein, he cannot assail the order in this action, that the court had jurisdiction to order the sale notwithstanding the lack of notice to the plaintiff, and that the plaintiff's only remedy was by a direct attack upon the order of sale. Code, section 3324, provides as follows: Before any order for the sale of an

intestate's land for the payment of debts can be made, "all persons interested in such real estate shall be served with notice in the same manner as is prescribed for the commencement of civil actions, unless a different one is prescribed by the court or judge." That the appellee was an interested party in reference to the administrator's sale of the real estate we do not think can be successfully disputed; in fact, the appellants do not claim that he was not such an interested party as the statute refers to. His attachment had been levied upon the real estate in Keokuk county, and such levy had not been released or in any way affected thereafter. Being entitled to notice under the statute, and no notice of any kind having been given him, we think it clear under the decisions of this court that the lien of his attachment and judgment was never displaced by the title acquired by the defendants, and that he may properly assail said order in this collateral action. The question presented involves the power of the court to make an order or render a judgment displacing his lien without notice of any kind to him, and, if the court had no jurisdiction to make the order, it may be attacked in a collateral proceeding. *Good v. Norley*, 28 Iowa, 188; *Valley National Bank v. Crosby*, 108 Iowa, 651; *Rankin v. Miller*, 43 Iowa, 1; *Washburn v. Carmichael*, 32 Iowa, 475. And see, also, *Thornton v. Mulquinne*, 12 Iowa, 554; *Cooper v. Sunderland*, 3 Iowa, 129; *Morrow v. Weed*, 4 Iowa, 77; *Shawhan v. Loffer*, 24 Iowa, 217; *Iowa L. & T. Co. v. Holderbaum*, 86 Iowa, 1.

In support of their contention, the appellants chiefly rely upon *Spurgin v. Bowers*, 82 Iowa, 187, and at first blush the case appears to be authority for their contention, but a careful analysis of that case shows that it is distinguishable from the case at bar. There a sale was made without notice, and it was claimed that the entire order should be set aside and the sale itself be declared null and void because of the want of notice. This is made to appear very clearly from the language of the opinion, and the court refused to grant

that particular form of relief. The opinion says: "The contention of the appellant is not that the order of sale is inoperative as to the interest he claims, but as to the whole." The court did not determine therein that the sale was inoperative as to his interest, but only that the entire proceedings were not void because of the failure to serve notice on only one of several parties having an interest in the real estate. It is true that some of the reasoning of the opinion lends support to the appellants' contention herein, but its use was not necessary in the disposition of that particular case, and we are not inclined to adopt it as a rule governing this case, when the effect would be to overrule several former decisions of the court. It was determined by this court in *Good v. Norley, supra*, that a proceeding to sell the real estate of an intestate for the payment of his debts is not *in rem*, but is adversary; and, if this be true, it must follow that jurisdiction of the person cannot be acquired without some form of notice, and, further, that a necessary party to legal proceedings is entitled to his day in court, and this is true whether the proceeding be in probate or elsewhere. The plaintiff never having been given such an opportunity, his interest in the land in question could not be affected by the order or judgment, and the decree of the district court must be, and it is *affirmed*.

PHOEBE J. COLE, Appellee, v. L. T. THOMPSON, Appellant.

Trespass: MEASURE OF DAMAGES. Where it is not shown that the
1 trespass of cattle continued through the season the measure of damages is not the rental value of the land, but the difference in value of the crops before and after the damage, especially where it appears other cattle trespassed upon the premises during the season.

Same: EVIDENCE: INSTRUCTIONS. Where there is no proof of dam-
2 ages in an action for trespass except the rental value of the land, the plaintiff is only entitled at most to nominal damages,

and the court in submitting the case should point out the rule as to the measure of damages.

Motion for new trial: AMENDMENT OF PLEADING. After the over-
3 ruling of a motion for a new trial, based on an error in the instruction and failure of the testimony to sustain the verdict, the court should not permit an amendment introducing a new cause of action which will bring the case within the instruction and the evidence.

Trespass: DAMAGES: FACT QUESTIONS. Where there is no evi-
4 dence of damage in an action for trespass except the rental value of the land, as a whole, and it appears that defendant used a portion of the tract trespassed upon in such manner that he should be held for use and occupation, it is for the jury to say whether there was a simple trespass or an implied agreement to pay rent.

Trespass: LIABILITY. One who is a mere trespasser upon land
5 cannot be held for the use and occupation thereof.

Pleadings: AMENDMENT: CHANGE OF ACTION. After a cause has
6 been tried and submitted on the theory of a trespass a new cause of action, seeking recovery on the ground of an implied agreement to pay rent, cannot be made by amendment of the pleadings.

*Appeal from Winnebago District Court.—HON. C. H. KEL-
LEY, Judge.*

THURSDAY, JUNE 6, 1907.

ACTION to recover for trespass upon plaintiff's real estate. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals.—*Reversed.*

G. H. Belsheim, for appellant.

No appearance for appellee.

DEEMER, J.—Plaintiff, in her petition, alleged that she was the owner of fifty-five and one-half acres of land, forty acres of which was meadow, four of creek bed, and four of timber land. That in the year 1905, defendant willfully

and maliciously permitted about thirty head of cattle to go upon said land and to eat, tramp down, and destroy all the grass growing upon the meadow land, to the damage of plaintiff in the sum of \$100; and \$100 was asked as exemplary damages. Defendant denied the allegations of the petition, pleaded that he had at his own expense erected a fence between his own and plaintiff's land, and that, if any damages were done to plaintiff's land, it was because of her failure to join him in the erection of a partition fence. He also pleaded a counterclaim for corn converted by plaintiff. Upon these issues the case was tried.

Over defendant's objections plaintiff was permitted to show the market or rental value of the land upon which she claimed defendant permitted his stock to trespass during the year 1905. As the action was clearly for trespass, and there was no showing that defendant's cattle were in the pasture during the entire season, it is manifest that this was not the proper measure of damages. *Harrison v. Adamson*, 76 Iowa, 337; *Id.*, 86 Iowa, 693. The true measure of damages in such cases is the difference in the value of the crop destroyed before and after the damage was done. Moreover, it was shown that other cattle than those belonging to defendant were upon plaintiff's premises during the season of 1905, and for these trespasses defendant would not be liable. *Foster v. Bussey*, 132 Iowa, 640.

The case was submitted to the jury on the theory of trespass and for damages; but the trial court gave this instruction as to the measure of damages: "In order for plaintiff to recover any sum of defendant upon her claim as set out in paragraph 1 hereof, plaintiff must prove by the weight or preponderance of the evidence introduced upon the trial that defendant's cattle did go upon her land and eat, trample down, and destroy the grass growing thereon, substantially as claimed by plaintiff, and the amount of damages sustained by her because thereof." As

1. TRESPASS:
measure of
damages.

2. SAME: evi-
dence: in-
structions.

there was no proper proof of any damages, but simply of rental value, the verdict should have been for defendant, or perhaps for plaintiff, for simply nominal damages. The instruction does not point out the measure of damages, but the testimony was directed to market or rental value for the use of the land.

A verdict was returned for plaintiff some time prior to February 12th, and on this last-named date defendant filed a motion for a new trial, based upon error in giving the instruction quoted, and failure of testimony to sustain the verdict, and on March 9, 1906, plaintiff filed an amendment to her petition, charging use and occupation of the premises and an implied agreement to pay the rental value thereof. Defendant moved to strike this amendment; but this motion, as well as his motion for a new trial, was overruled, and judgment was entered upon the verdict. As the testimony in support of such an issue was received over defendant's objections, he had a right to rely upon the ruling then made, and the court could not a month after the verdict was received cure the error by permitting an amendment to the petition introducing a new cause of action. Defendant had the right to try the case upon the issue as made, and to meet any new case which might be made by proper testimony.

Moreover, even with such an amendment in the case in proper time, it was for a jury to say under the testimony in this case whether or not there was simply a trespass by defendant's cattle or an implied agreement to pay rent for the use of the land. No one testifies that defendant's cattle were upon the premises during the entire season. Indeed, there was some testimony to the effect that defendant built a fence to keep his cattle off of plaintiff's land, that they broke through this fence and went upon plaintiff's land some two or three times during the season, and that defendant attempted to keep this fence in repair. There was a part of plaintiff's land which, no doubt, defendant used in such a manner that he should be held for

3. MOTION FOR
NEW TRIAL:
amendment
of pleadings.

4. TRESPASS:
damages: fact
questions.

the use and occupation thereof; but this was a small tract, and there was no testimony as to the rental value thereof as distinct from the other land.

One who is a trespasser upon land cannot be held for use and occupation for the reason that the relation of landlord and tenant does not exist by implication in such cases.

That there was no express agreement to pay rent is distinctly shown by plaintiff's testimony. Of course, an implied agreement may be shown by circumstances; but action for use and occupation will not lie against a trespasser, or one whose possession is tortious. This is the rule established by practically all the cases. See *Carrigg v. Bank*, (Iowa) 111 N. W. 329; *Williams v. Brown*, 76 Iowa, 643.

There may be cases where a plaintiff may waive the tort and sue for use and occupation; but upon this point the authorities are in conflict, and we need not now indicate our views upon this proposition, for there was not such waiver until the amendment to the petition was filed after trial, and the election, if there was one, was made long before that time. The case was not tried or submitted to the jury on that theory, and, conceding arguendo, plaintiff's right to waive the tort and sue upon contract, it was a question for the jury to determine whether or not the circumstances shown indicated an implied agreement to pay rent. A new case cannot be made by amendment after trial. This matter of right to sue for use and occupation is discussed very thoroughly in an article by Prof. Ames, in 2 Harv. Law Review, 377; and see also Keener on Quasi Contracts, 191, 192.

The doctrine of election of remedies does not necessarily arise upon this appeal, save as it involves plaintiff's right to amend after verdict. We shall not go into that question now, for it is not presented in argument, and the point is of too much doubt to be solved without full discussion.

For the errors pointed out, the judgment must be, and it is, *reversed*.

5. TRESPASS:

6. PLEADINGS:
amendment:
liability.

134	690
135	379

134	690
138	395

LEONARD DOGETT, by his next friend, MARY DOGETT, v.
CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY,
Appellant.

Railroads: TRESPASSERS: REQUIRED CARE. The conductor of a train
1 owes a trespasser thereon no affirmative duty, and is only re-
quired to exercise ordinary care in ejecting him, and is
chargeable only with what he knows, or in the exercise of
ordinary care should know, of the danger of ejecting him
from a moving train.

Contributory negligence: EVIDENCE: INSTRUCTIONS. The physical
2 infirmity of a trespasser upon a train may be taken into con-
sideration by the jury in determining his negligence in alight-
ing while the train is in motion; but his age and experience
should not be taken into consideration where there is nothing
in the evidence to indicate that by reason thereof he was less
able to exercise care and discretion for his own safety.
WEAVER, C. J., dissents from the opinion announced in this
paragraph.

Appeal from Jefferson District Court.—HON. C. W. VER-
MILLION, Judge.

THURSDAY, JUNE 6, 1907.

ACTION to recover damages for personal injuries al-
leged to have resulted to plaintiff from being ejected in a
negligent manner from the caboose of a freight train of
defendant, on which he was riding without defendant's con-
sent and as a trespasser. There was a verdict of \$500 in
plaintiff's favor, and from the judgment thereon defendant
appeals.—*Reversed.*

Leggett & McKemey, for appellant.

Crail & Crail and *Rollin J. Wilson*, for appellee.

MCCLAINE, J.—The plaintiff, seventeen years of age,
with a companion, boarded the way car of defendant's freight

train about a mile west of Fairfield, with the intention of riding into town without paying any fare. The evidence tends to show that the conductor of the train told them the train would not stop at Fairfield, and ordered them to get off, and, in attempting to do so while the train was in motion, plaintiff, who was somewhat incapacitated by having a crippled leg, fell, breaking his crippled leg and receiving other injuries.

I. The jury was instructed, with reference to the act of the conductor in ordering plaintiff to get off the car while the train was in motion, that, if the train was moving at so low a rate of speed as that a person in possession of ordinary use of his limbs and of ordinary activity could have alighted therefrom in safety, "and that said conductor did not know, and in the exercise of ordinary care could not under the circumstances have known, that plaintiff was crippled and did not possess the ordinary use of his legs, and the injury to plaintiff was caused by his crippled condition, and not by the speed of the train, then the defendant would not be chargeable with negligence on account of the acts of the conductor." Bearing in mind that the plaintiff was confessedly a trespasser, to whom the defendant owed no affirmative duty, we think this instruction was plainly erroneous. It was only so far as the conductor had knowledge of an injury likely to result from compelling the plaintiff to get off the train while in motion that defendant would be chargeable with the consequences of the conductor's act. *Earl v. Chicago, R. I. & P. R. Co.*, 109 Iowa, 14; *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa, 248; *Clemans v. Chicago, R. I. & P. R. Co.*, 128 Iowa, 394; *Cleveland C. & C. R. Co. v. Terry*, 8 Ohio St. 570.

The rule that the conductor should have acted with reference to what might have been known to him, in the exercise of reasonable care, with reference to plaintiff's condition, might have been applicable if plaintiff, having

rightfully entered upon the train, was being ejected for some misconduct on his part which justified the conductor in ejecting him; but, being from the first a trespasser the conductor owed him no affirmative duty. The rule as to the care required in ejecting a trespasser is not the same as that which applies in case of the ejection of one who has been rightfully on the train. *Earl v. Chicago, R. I. & P. R. Co.*, *supra*. In the case last cited it was said that, to render the railroad company liable under such circumstances the action of the conductor must be wanton and willful, and we have no inclination to modify the rule announced in that case; but it is sufficient for the present case to say that the instruction charging the conductor with the affirmative duty of ascertaining whether plaintiff was a cripple before putting him off the train was erroneous. We think the instruction charging the conductor with the exercise of ordinary care in putting plaintiff off the train, and saying that in doing so he was charged with what he knew, or in the exercise of ordinary care should have known, as to the danger of putting a person off a moving train, was correct. Even as to trespassers, the conductor should take into account that which an ordinarily prudent person would know might be the probable consequences, in view of the speed of the train, of causing a person to alight therefrom. *Johnson v. Chicago, St. P., M. & O. R. Co.*, 123 Iowa, 224.

An instruction asked for plaintiff, and refused, to the effect that to charge defendant the injury must have been the result of the negligent act of the conductor, in view of the knowledge he had of plaintiff's condition, was sufficiently covered by an instruction given, and it was not error to refuse it.

II. In one of the instructions given, the jury were directed to take into account the age, experience, and physical infirmity of the plaintiff in determining whether he was guilty of contributory negligence in jumping off the train under the cir-

2. CONTRIBUTORY
NEGLIGENCE:
evidence:
instructions.

cumstances. So far as physical infirmity was concerned, this instruction was, no doubt, correct, for while the conductor was not bound to take into account plaintiff's infirmity, unless he had knowledge thereof, yet, on the other hand, in determining whether plaintiff was negligent, the jury was justified in taking that fact into consideration. *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570. But in so far as the instruction allowed the jury to take into account the plaintiff's age and experience, we think that it was erroneous. The manifest purpose of the instruction was to advise the jury that they might find the plaintiff, on account of his immaturity of age and want of experience, to be free from contributory negligence. The evidence showed plaintiff to have been over seventeen years of age at the time of the accident, and there is nothing to indicate that he did not possess the discretion which is usually possessed by persons of that age; nor is there anything to indicate that he did not by reason of exceptional want of opportunity know that it was dangerous to jump from a moving train. Unless, therefore, the mere fact of his age was in law sufficient to justify a finding by the jury that he was not required to use the same care as ordinary persons are required to use, it was error to instruct the jury that they might take into account his age in determining the question of his contributory negligence. We suppose it would hardly be contended that, if plaintiff had been over twenty-one years of age, it would have been competent to tell the jury they might take his age into account. There must be some limit in law as to what may be considered in excusing acts which on the part of ordinary persons would as a matter of law constitute contributory negligence. That persons under twenty-one years of age, that being the age of majority with reference to political rights and the capacity to make binding contracts, are not to be presumed on that account to be less capable than persons of ordinary prudence to exercise care and discretion with reference to their safety, is manifest. No court, so far as we

can discover, has made the age of twenty-one the dividing line in regard to responsibility for acts constituting negligence in an ordinary person, and it has been expressly held that as matter of law such distinction does not exist. *Nagle v. Allegheny Valley Railroad Co.*, 88 Pa. 35 (32 Am. Rep. 413); *Pueblo Electric Street Ry. Co. v. Sherman*, 25 Colo. 114 (53 Pac. 322, 71 Am. St. Rep. 116). We must therefore adopt some other rule applicable to such cases, or leave the jury free to arbitrarily recognize any excuse which may appeal to their sentiments or prejudices. *Nagle v. Allegheny Valley R. Co.*, 88 Pa. 35 (32 Am. Rep. 413); *Tucker v. New York Central & H. R. R. Co.*, 124 N. Y. 308 (26 N. E. 916, 21 Am. St. Rep. 670); *Frauenthal v. Gaslight Co.*, 67 Mo. App. 1, 11; *Pueblo Elec. St. Ry. Co. v. Sherman*, 25 Colo. 114 (53 Pac. 322, 71 Am. St. Rep. 116). As was said in the *Tucker* case, *supra*: "Aside from evidence of the boy's age, no fact was adduced tending to show that he was not as well qualified to understand and appreciate the danger which overtook him as an adult, and the question is therefore fairly presented whether the jury can be permitted to find from such fact, standing alone, that he was *non sui juris*. . . . In the absence of evidence tending to show that an injured infant twelve years old was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track which an adult would, he must be deemed *sui juris*." And the court therefore held that a verdict in favor of the administrator of a child of that age, killed by the train of a railway company at a highway crossing, must be set aside on account of contributory negligence of the child in not looking and listening for the approach of a train; there being nothing but the child's age to indicate that he was free from contributory negligence.

It is difficult, under the authorities, to state any satisfactory rules of universal application as to the effect of the age of the injured person with reference to the question of

contributory negligence. Courts have apparently been reluctant to announce definite rules on the subject; but in several of the best considered cases the distinctions as to responsibility on account of age recognized in the criminal law have been regarded as furnishing the best guidance in determining responsibility for negligence. Thus, in *Nagle v. Allegheny Valley R. Co.*, 88 Pa. 35 (32 Am. Rep. 413), it is said that in analogy with the rule that after fourteen years of age an infant may choose a guardian and contract a lawful marriage, and must be held responsible for his crimes to the same extent as an adult, an infant fourteen years of age "is presumed to have sufficient capacity and understanding to be sensible of danger, and to have power to avoid it." Accordingly it was held in that case that, under evidence, which would have charged the deceased, for whose death on account of the negligence of the defendant recovery was sought, with contributory negligence had he been an adult, there could be no recovery, although it appeared that the deceased, who was killed while attempting to cross a railroad track in front of a moving train, was between fourteen and fifteen years of age. In *Tucker v. New York C. & H. R. R. Co.*, 124 N. Y. 308, *supra*, the rule announced in the Pennsylvania case is approved, and, as in New York twelve years is fixed by statute as the age after which criminal responsibility of an adult attaches, it is held that after that age a boy must be deemed *sui juris* and chargeable with the same measure of caution as is an adult. In *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590 (46 S. E. 908), the standard of criminal responsibility is applied in determining contributory negligence, and it is held that between the ages of seven and fourteen years a child is presumed to be incapable of contributory negligence, while after the latter age no such presumption exists. And in *Chicago City R. Co. v. Wilcox*, 138 Ill. 370 (27 N. E. 899, 21 L. R. A. 76), the same standard is recognized, with a question

whether under seven years of age a child is to be conclusively presumed incapable of contributory negligence.

An examination of a very large number of cases relating to the liability of children for contributory negligence leads to the conclusion that, while in many of them no definite rule is announced, they substantially without conflict hold that the presumption of responsibility attaches at the age of fourteen years; that prior to that age there is a presumed incapacity which must be overcome in order to defeat recovery on account of contributory negligence by proof that the child did not exercise the care and discretion usual with children of a similar age, which is assumed to be less than that required of persons of mature years; while after that age the presumption is that there is the capacity for care and discretion with reference to the usual affairs of life possessed by persons of ordinary intelligence, irrespective of age, and that to authorize the jury to take age into account there must be some proof that by reason of immaturity the injured person was less capable than an ordinarily prudent person, of exercising care and discretion for his own safety. In addition to the cases already cited, reference may profitably be made to the following: *Coleman v. Himmelburger-Harrison Land & Lbr. Co.*, 105 Mo. App. 254 (79 S. W. 981); *Crown v. Orr*, 140 N. Y. 450 (35 N. E. 648); *Hickey v. Taafe*, 105 N. Y. 26 (12 N. E. 286); *Higgins Carpet Co. v. O'Keefe*, 79 Fed. 900 (25 C. C. A. 220); *Koehler v. Syracuse Specialty Mfg. Co.*, 42 N. Y. Supp. 182, 1105; *McDonald Metropolitan Street R. Co.*, 80 N. Y. Supp. 577; *Holmes v. Missouri Pacific R. Co.*, 190 Mo. 98 (88 S. W. 623); *Shelley v. City of Austin*, 74 Tex. 608 (12 S. W. 753). The cases may be found fully collected in 1 Thompson, Negligence (2d Ed.), sections 307-318; 2 Current Law, 1004; 4 Current Law, 774; 6 Current Law, 764. And, as announcing the rule already suggested, as drawn from the volume of cases on the subject, see Bishop, Non-contract Law, sections 585-587.

The decisions of this court are in harmony with the rules above suggested, as deducible from examination of the authorities in other States. It has been repeatedly held, with reference to children of tender years, that they are not chargeable with contributory negligence, and, so far as we now discover, the cases in which this ruling has been made have been cases where the children were under seven years of age. *Fink v. Des Moines*, 115 Iowa, 641; *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa, 248; *Fishburn v. Burlington & N. W. R. Co.*, 127 Iowa, 483. In cases involving the negligence of children between seven and fourteen years of age, we have held that they might under the circumstances of the particular case be guilty of negligence in not giving such attention to their surroundings and exercising such care to avoid danger as may fairly and reasonably be expected from persons of their age and capacity. *Merryman v. Chicago, R. I. & P. R. Co.*, 85 Iowa, 634; *Carson v. Chicago, R. I. & P. R. Co.*, 96 Iowa, 583; *Benton v. Chicago, R. I. & P. R. Co.*, 55 Iowa, 496; *Masser v. Chicago, R. I. & P. R. Co.*, 68 Iowa, 602; *McMillan v. Burlington & M. R. R. Co.*, 46 Iowa, 231. In no case decided in this court, so far as we can discover, has it been held that the fact of age alone gave rise to any presumption, or was entitled to consideration, where the person whose negligence was in question was over fourteen years old. In *Shebeck v. National Cracker Co.*, 120 Iowa, 414, with reference to an injury to an inexperienced boy of eighteen years, it was said: "The degree of care he was bound to exercise to absolve himself from contributory negligence is such care as might reasonably be expected from one of his age and experience under like circumstances and surroundings." However, the case was not one involving contributory negligence, but assumption of risk; and the contention of the administrator of the boy, who was killed by being caught in the machinery of a factory in which he was at work, was that he had not assumed the risk of the defective condition of the machinery,

although he was aware of its condition, and had remained in the employment without objection. The question of the assumption of risk of the dangers of a particular employment is very different from that involved in the determination of the question whether under ordinary circumstances and conditions an injured person has exercised the care which a reasonably prudent person would exercise for his own safety. It may well be that the age and experience of a person over fourteen years of age may be taken into account in determining whether he appreciates the danger of a particular hazard, where the hazard is peculiar to a special employment and not such as ordinary persons are called upon to meet; but it will not do to say that an act, such as that of jumping off a train while in motion, which is made criminal in all persons over fourteen years of age (see Code, section 4811), is not negligent in a person of that age, if an ordinary adult would be charged with negligence under the same circumstances.

We reach the conclusion, therefore, that, in the absence of any evidence indicating that by reason of age or inexperience, save the mere incidental fact that he was seventeen years of age at the time of the accident, plaintiff was less capable than an ordinary person in looking out for his own safety, it was error for the court to refer to the matter of age and experience as proper for the consideration of the jury in determining whether plaintiff was guilty of contributory negligence.

III. Misconduct of counsel for plaintiff, in his closing address to the jury, is also urged as a reason why this judgment should be reversed. Some portions of this argument, as they appear in the record, cannot be justified, and we doubt whether any objection which could have been made thereto at the time, or any ruling which the court could have entered in response to such objection, would have obviated the prejudice likely to result. Perhaps it might be said, if there had been prompt objection, the improper course of argument would not have been persisted in, and

that prejudice on that ground might have been avoided. In view of the necessity of a new trial, it is enough to call attention to the subject by way of caution. Perhaps even this is unnecessary, as the counsel whose argument is **complained of** has practically confessed the impropriety of the argument made.

The judgment of the trial court is *reversed*.

WEAVER, C. J.— I concur in the result on the first point discussed in the foregoing opinion, but dissent from the conclusion announced in the second paragraph.

BROWN BROTHERS, Appellants, v. KORNS and LEE, Appellees.

False representations: PROOF. In an action for false representations it must not only appear that the representations were made and relied upon, but that they were known by defendant to be false.

Sales: WARRANTIES: CONSTRUCTION. In the interpretation of a writing the document must be read as a whole; so that in construing an advertisement of fancy cattle offered for sale, containing a general warranty as to breeding quality and also providing that "a cow with calf at side is a proven breeder;" the purchaser of a cow with a calf at her side cannot rely on the general warranty but takes the animal at his own risk.

Appeal from Poweshiek District Court.— HON. B. W. PRESTON, Judge.

THURSDAY, JUNE 6, 1907.

ACTION for damages for breach of warranty in the sale of a cow. Judgment for defendants upon a directed verdict, and plaintiffs appeal.— *Affirmed*.

Prouty, Coyle & Prouty and *Clark & Clark*, for appellants.

U. M. Reed and W. R. Lewis, for appellees.

WEAVER, C. J.—The defendants are breeders of short-horn cattle at Victor, Iowa. On June 7, 1902, they held a public sale at which numerous animals of said breed were offered to purchasers. This sale had been advertised by circulars and catalogues setting forth a list and description of the animals to be offered for sale and the terms upon which the offer was to be made. In said catalogue there was listed a cow "Lily," to the pedigree of which the following note was appended: "Lily is a fine large cow, straight, smooth, of good quality, and a good breeder. Has bull calf at foot dropped September 1, 1901 by Imp., Red. Light 149, 769." The published guaranty so far as applicable, was in the following words:

Our Guaranty and what it means: On males, all bulls, guaranteed breeders when properly cared for. If bulls fail to breed, we must be notified within six months from date of sale. We reserve the right when so notified to have the bull returned to us for further trial, bull to be in good condition as when sold, and, if he then fails to breed, the purchase price will be returned, with interest at the rate of seven per cent. per annum from time of sale until bull was returned to us, but if bull breeds for us, he will be returned to purchaser at his expense. On females, all females of breeding age are guaranteed breeders when properly cared for. A cow with calf at side is proven a breeder. Purchaser will be required to try females for six months, and, if barren, we reserve the right to have them sent to us for 90 days' trial, and, if we succeed in getting them with calf, they will be returned to purchaser at his expense; otherwise money will be refunded as above. A cow that has passed service four months at date of sale is considered a breeder, but should such cow break service within six weeks theretofore we must be notified by wire at our expense, and, if she is proven not to be a breeder, same conditions apply as above. All known defects will be pointed out on day of sale. Every animal offered will be sold to the highest bidder.

It should also be said that the catalogue described the cow Lily as having been bred May 8, 1902. One of these catalogues was sent by defendants to the plaintiffs, who were residents of Humboldt county, and they attended the sale, at which they purchased the cow Lily with the bull calf, which the catalogue described as having been dropped by her in September, 1901.

It is alleged in the petition that this purchase was made under the printed warranty or guaranty which we have above quoted from the defendants' catalogue, and that the cow proved, in fact, not to be a breeder. In a second count plaintiffs declare upon a breach of warranty said to be contained in the note which we have referred to as being attached to the pedigree of the animal in the catalogue, to the effect that Lily was a "fine cow, straight, smooth, a good quality, and a good breeder." A third count is grounded upon the allegation that the description of the cow and of her condition and quality as contained in the catalogue were false and misleading, and known so to be by the defendants when they issued it, and that plaintiffs relied thereon, to their injury. The answer of the defendants admits the sale of the cow, and that such sale was made under the terms contained in the printed catalogue, and aver that by the express language of their offer the cow Lily having a calf at her side was to be considered a breeder, and deny that they ever in any manner undertook to warrant her breeding qualities or be in any manner responsible if she failed to again become with calf. There is no claim in pleading or in evidence that defendants made any oral representation with reference to the cow, and, the warranty, if there be one, must be found in the language of the printed catalogue.

I. Taking up the issues in inverse order, we will first consider whether there is anything in the record which re-

1. FALSE REPRESENTATIONS:
proof.

quired the claim of false representations to be submitted to the jury. In our judgment there was not. To sustain that charge there must be evidence

not only of the representations and of their falsity and of the reliance thereon by plaintiffs to their injury, but it must also be shown that defendants made the representations knowing them to be false. In this we think the plaintiffs wholly failed. The only item of evidence having even the slightest tendency in that direction is the fact that during the months between September and May the cow had been bred several times unsuccessfully. But it appears without substantial dispute that she had borne a calf in the year 1900, and again in 1901, and that it was not unusual nor indicative of defective conditions in such animal, while suckling a calf to "break service." Moreover, it is shown, without controversy, that this cow was bred on May 8th, some thirty days prior to the sale, considerably more than the period which would ordinarily intervene without break of service, thus affording fair ground for the belief that she was with calf. On such a narrow foundation we think a verdict finding the defendants guilty of false representations in this respect could not be permitted to stand.

II. We are also of the opinion that the plaintiffs cannot segregate the note appended to the printed pedigree to the effect that Lily was a good breeder from the rest of the matter in the catalogue, and rely upon that alone as they seek to do in the second count of the petition. To arrive at the meaning and intent of the printed invitation to purchasers, it is but fair as it is in accordance with elementary rules governing the interpretation of writings that we read the document as a whole. The only alleged cause of action over which there is any room for serious debate is the one stated in the first count of the petition which sets out the language of both clauses to which we have referred. Reading the entire catalogue so far as it is pertinent, we find that purchasers are expressly advised that among the conditions of the sale is one by which a cow with calf at side is proven a breeder. Now, this may not be a safe indication of continuing fertility in a cow, and a person

2. SALES: war-
ranties: con-
struction.

buying under such conditions may find the animal worthless for further breeding purposes, but it is a chance which a buyer is at liberty to take if he will, and, if being fully advised that this is a condition of any purchase he may make, he proceeds to buy, he alone is chargeable with the loss in the absence of fraud on part of the seller. This particular cow was noted in the catalogue as having a calf at foot, and therefore coming within the definition of "breeder" as laid down by the terms of the offer. The date of the birth of the calf was given, and the date when the cow had last been bred. Some question is raised in argument that the calf with this cow was weaned, and that, therefore, Lily was not a cow with calf "at side" within the meaning of the language of the catalogue. We do not see how the objection can be of any avail. The cow was offered for sale as being within this class, and therefore an animal which was excepted from the general warranty contained in the catalogue. In other words, defendants offered this cow for sale expressly without warranty — offering no other assurance of her breeding quality except such as the buyer could draw from the fact that she had already produced one or more calves. If plaintiffs elected to buy under such circumstances, the failure of the cow to breed does not constitute a breach of warranty for none was given. We must not be understood as suggesting that the defendants could by this device avoid liability for misrepresentation or for concealment amounting to fraud in inducing sales of worthless or defective cattle. No such case is presented by the record, and we are not called upon to discuss the proper remedy for such a wrong.

We agree with the trial court that plaintiffs failed to make a case for the jury, and the judgment appealed from is therefore *affirmed*.

S. N. HARRIS, Appellant, v. J. M. MOORE.

134	704
136	504
136	532

Challenge to jurors: SPECIFICATION OF GROUNDS. As a general rule

- 1 a challenge to a juror for cause generally, without specifying the particular ground thereof, does not call for a ruling from the court; but where the examination clearly discloses the precise objection it is sufficient to require a ruling.

Challenges: DISCRETION: PREJUDICE. A cause will not be re-

- 2 versed because of the denial of a challenge for cause, where there is no showing of an abuse of discretion in so ruling, or that the party complaining had exhausted his peremptory challenges and was prejudiced by the ruling.

Contracts: PROOF OF PERFORMANCE. When no time is fixed by the

- 3 parties within which a contract is to be performed it is necessary, in suing thereon, to prove performance within a reasonable time.

Appeal from Kossuth District Court.—HON. W. B. QUARTON, Judge.

THURSDAY, JUNE 6, 1907.

SUIT at law to recover a commission for the sale of real estate. There was a trial to a jury, and a verdict and judgment for defendant, from which the plaintiff appeals.—*Affirmed.*

Frederick M. Curtiss and George E. Clarke, for appellant.

Sullivan & McMahon and E. A. Morling, for appellee.

SHERWIN, J.—But two questions are raised on this appeal. The first relates to the qualifications of one of the jurors who was challenged for cause, and the other to an instruction given by the court on its own motion. Code, section 332, provides that only such persons are competent as

jurors who can speak, write, and read the English language. In the examination of the juror John Deeg, it was developed that, while he could both speak and read the English language, he was not proficient in the other qualification. The net result of his examination disclosed the fact that he could write English some, but not very readily, and that his writing thereof was confined to the common words. His answer to one question was: "I can write it, but I cannot write it very well." The challenge was for cause generally without specifying the particular ground thereof and the appellee contends that the challenge was in itself insufficient to require a ruling from the court. That such is the general rule there is no question; but, while there was no specific ground of challenge in this instance, the examination of the juror clearly disclosed that the challenge was based on his lack of ability to write the English language, and this we think was all that was required.

There are two reasons why a reversal of this case cannot be had because of the court's ruling on the challenge. In the first place, the record fails to show that the plaintiff was prejudiced by the ruling, because it is not shown that the plaintiff had exhausted his peremptory challenges. *Haggard v. Petterson*, 107 Iowa, 417; *State v. Brownlee*, 84 Iowa, 475. Furthermore, the ruling was within the sound discretion of the court, and there is nothing in the record indicating that such discretion was abused. *State v. Crouch*, 130 Iowa, 478; *Wilson v. Wapello County*, 129 Iowa, 77.

The remaining question relates to the tenth instruction, which is claimed by the appellant to have been prejudicial error, because it presented for the consideration of the jury a question not at issue in the case. The plaintiff in his petition alleged that he entered into a contract with the defendant for the sale of his land at a stipulated price; he to receive all for which the land was sold above such price. He did not allege in his petition that the contract was to be performed within any particular time, and he testified as a wit-

ness that no time of performance was agreed upon. The answer contained a general denial, and pleaded further that the plaintiff had no contract for the sale of the land at the time he claimed to have produced a purchaser therefor. The instruction complained of was to the effect that, where no time was fixed for the performance of a contract, it must be performed within a reasonable time. The instruction was clearly correct under the issues and the evidence. Before recovery could be had by the plaintiff, it was necessary for him to plead and prove a performance of his contract, and under a general denial the defendant had the right, not only to offer testimony in denial of the contract as claimed by the plaintiff, but also to prove the contract which was in fact made, and no performance thereof on the plaintiff's part. *Tracy Land Co. v. Polk Land Co.*, 131 Iowa, 40. No time being fixed by the parties within which the contract was to be performed, it was necessary for the plaintiff to prove that he had performed it within a reasonable time, and the instruction complained of was not only perfectly proper, but it was absolutely necessary for the presentation of the case to the jury.

There is no error in the record, and the judgment is affirmed.

TALKE TEMPLE, Appellee, v. HAMILTON COUNTY and
GEORGE R. STEVENS, Appellant.

Drainage: DISMISSAL OF PROCEEDING. Appearance of a county attorney, in a proceeding to establish a drainage district pending on appeal in the district court, and the entry by him of a disclaimer by the county of any interest in the proceeding, does not amount to a dismissal of the proceeding and preclude further action therein by the real parties in interest.

Same: AUTHORITY OF SUPERVISORS. After the preliminary steps for the establishment of a drainage district have been taken and the matter is pending on appeal in the district court, the

134	706
137	672
134	703
141	386
142	80
142	81
142	82
142	83
134	706
143	477

board of supervisors has no power to dismiss the proceedings and thus nullify the order of establishment, unless it shall first find some fatal defect in the proceeding, or that it is not a work of public utility, or that the benefits are not commensurate with the cost.

Same: INTERVENTION BY PETITIONER. On appeal from an order establishing a drainage district and the construction of drains therein, a petitioner whose lands are affected and who has given the bond of costs, may intervene and defend the order.

Establishment of drainage system: REVIEW. Primarily the utility of establishing a drainage system is for the board of supervisors to determine, and the court will not interfere with its finding unless the evidence is very clear that it is not a work of public utility, or the benefits are not commensurate with the cost; and the burden of making such a showing is upon the party attacking the order.

Appeal from Hamilton District Court.—HON. J. R. WHITAKER, Judge.

THURSDAY, JUNE 6, 1907.

APPEAL from a judgment of the district court, reversing and setting aside an order made by the board of supervisors of Hamilton county for the establishment of a drainage district.—*Reversed.*

D. C. Chase, for appellant.

Wesley Martin and G. D. Thompson, for appellee.

WEAVER, C. J.—A petition having been presented for the establishment of the drainage district in question, the board of supervisors appointed an engineer to make the preliminary survey. This was done, and report thereof duly returned. Notice of the proposed action was duly given, and certain persons whose lands would be affected by such proceedings presented a remonstrance against the construction of the ditch. Upon the day named therefor the re-

monstrants appeared before the board with counsel, and contested the granting of the petition. At the conclusion of the hearing, it was decided by a majority vote of the board that the preliminary proceedings had been conducted as required by law, and that the petition was sufficient, and that the proposed ditch was a work of public utility. At a later meeting of the board consideration was had of the claims for damages which had been presented and awards made aggregating \$203. A resolution was then adopted December 21, 1904, establishing the district and ordering the construction of the drain. Soon thereafter, and within the month of December, 1904, the appellee herein and several other persons owning land within the district appealed from said order. In January, after said appeal had been taken and the proceeding was pending in the district court and after the membership of the board had been changed in part, said board of supervisors, apparently without notice to the parties in interest, passed a resolution dismissing the attorney who had been employed to defend the proceedings on appeal, and directed the county attorney "to dismiss all proceedings which are now pending on appeal or may hereafter be pending in the matter of establishing said drainage district." In the district court the appellee herein, who was one of the remonstrants, was upon some theory permitted to file a petition as in an action in equity, setting up a history of the establishment of the ditch, and praying that the order therefor by the board of supervisors be "reversed, annulled, set aside, and held for naught" as being illegal and void. The county attorney, acting under the resolution of the board above mentioned, appeared in the proceeding, and disclaimed for the county any interest whatever in the same. Thereafter George R. Strever, petitioner for the ditch and principal upon the bond for costs, appeared and was permitted to intervene in support of the order, from which the appeal had been taken. On the trial of the appeal many witnesses were

examined upon both sides describing the district, its course of natural drainage, its liability to overflow, and other pertinent features and upon the record thus made judgment was entered that there was no necessity for the ditch, that its expense would create a greater burden than should properly be borne by the lands in the district, and that the resolution adopted by the board of supervisors on December 21, 1904, "should be, and the same is hereby, canceled, repealed, reversed, and held for naught," and that the costs be taxed to said Strever.

I. The appellee makes the point that the act of the board of supervisors in January, 1905, directing the county attorney "to dismiss all proceedings which are now pending on appeal or may hereafter be pending in the matter of the establishment of said drainage district," had the effect to put an end to the proceedings, and that Strever had no authority to further prosecute them, or to defend against the appeal taken by said Temple. We think the objection is not good. In the first place, if the board of supervisors had any authority to direct the county attorney to dismiss the proceedings, it is a sufficient answer to say that the record discloses no attempt by him to carry out such instruction and enter a dismissal. He did no more than to enter an appearance for the county and board of supervisors, and enter for them a disclaimer of any and all interest in the controversy, and further saying in behalf of the supervisors that their acts in the matter had been done "in compliance with law, and as a board of supervisors acting in a judicial capacity, and with their decision all their interests as a board or as individuals ceased, wherefore the defendants ask to be dismissed, with their costs." There is no suggestion here that the county desired to dismiss the proceedings, but rather an anxiety to allow the dispute to be fought out by the real parties without further cost to itself.

1. DRAINAGE:
dismissal of
proceedings.

Moreover, we very much doubt if the county has any authority pending an appeal to the district court to order or direct a dismissal of the proceeding, and thereby nullify the order of establishment. Nor has the board of supervisors any authority to dismiss the proceedings for the establishment of a drainage district, except as it shall find some fatal defect or irregularity in the proceedings or shall find upon a hearing on the merits of the application that the work is not one of public utility or the expense thereof a greater burden than should be borne by the lands benefited.

Nor do we think that any just objection can be raised to the appearance of Strever and the defense by him of the validity of the order appealed from. He was the petitioner for the ditch, and had given the statutory bond for costs and expenses. His land was to be affected by the proposed drainage. When, therefore, the county by its action notified him that it would take no further responsibility in the matter, and was entirely indifferent concerning the rights of the parties interested therein, we think it was the privilege of the petitioner to ask and within the power of the court to grant him leave to assume and carry on the defense. The statute does not definitely provide who shall be considered parties to the proceeding on appeal, nor how the case shall be entitled in the district court, but, if we assume that the county or the board of supervisors is properly a party to an appeal, it is only in a nominal or representative capacity which does not deny to the real parties in interest the right to control the proceedings and to defend their respective rights in the premises. *Yockey v. Woodbury County*, 130 Iowa, 412.

II. Arguments of counsel are very largely directed to the disputed question of fact, the need and propriety of the proposed drainage. We cannot go into a review of the testimony of the many witnesses; but have to say that we think

it fairly demonstrated that the proposed district contains much wet land, and that a large proportion of the farms and highways within the described area will be benefited by the construction of the ditch. The authority to pass upon the necessity of such an improvement, determine its public character, and fix the boundaries of the district is more legislative than judicial in its nature, and is intrusted, primarily at least, to the board of supervisors. That body is to find whether the improvement is one of public utility and conducive to public health and welfare; and when the damages, if any, are appraised, it is then to consider and determine whether the cost of construction and the amount of damages do or do not create a greater burden than should properly be borne by the land benefited. If these be found in favor of the petitioners, then it becomes the duty of the board to order the improvement established. Laws 30th General Assembly, chapter 68, sections 5, 6. In view of the fact already mentioned that these duties are in a large measure legislative in character, and the further obvious truth that the supervisors are on the ground where they can see and know the situation as no one can know it from the written or printed testimony, we are of the opinion that the court should be very reluctant to interfere and set aside their order on the ground that the ditch is not a work of public utility, or its cost is a greater burden than the lands benefited should bear, unless the evidence in support of the objection is so clear as to render that conclusion unavoidable; and the burden of making such showing is on the party attacking the order.

The record in this case is not of such character. As already stated the evidence strongly tends to show that this district or a large part thereof will be benefited in some degree by the ditch. Doubtless some will be benefited much more in proportion than others, and there may be some tracts which will receive no very perceptible benefit, but all these things are subject to adjustment, when the board shall come

finally to pass upon the classification of the land and the assessment of the cost of the improvement upon the property within the district. All matters of alleged unequal or improper assessment will then be considered, and the board is authorized upon such hearing to increase, diminish, annul, or affirm the apportionment made by the commissioners. We must presume that they will do their duty in this respect. We think it unnecessary to pursue the discussion.

Holding, as we do, that the evidence was insufficient to require a reversal of the order made by the board of supervisors, the judgment of the district court is *reversed*.

THE BROWN LAND COMPANY, Appellant, v. J. J. LEHMAN.

Erroneous admission of evidence: INSTRUCTION. The erroneous

- 1 admission of evidence can often be counteracted by an instruction to the jury not to consider it, but a presentation of the same in argument may render it so prejudicial that the error cannot be cured by the instruction.

New trial: EVIDENCE. The testimony of jurors, that they gave

- 2 consideration to evidence improperly admitted, is competent in support of a motion for a new trial based on their misconduct in disregarding an instruction withdrawing the same from their consideration.

Landlord and tenant: FAILURE TO CULTIVATE: MEASURE OF DAM-

- 3 AGES. Where a farm is held for rent any temporary detriment growing out of a failure to properly cultivate the land should be compensated for on the basis of a loss in rental value, rather than a depreciation in the market value of the premises.

Same: EVIDENCE. Evidence as to the length of time it will take

- 4 to eradicate weeds, which have been permitted to grow in violation of a lease, is material on the question of depreciation in the rental value of the premises.

Same: INSTRUCTION. Evidence that a special course of treat-

- 5 ment will be required to eradicate weeds, which have been permitted to grow upon land in violation of a lease, is competent on the question of damage to the rental value of the premises, and should be submitted with proper instructions.

Special interrogatories. When requested, special interrogatories, calling for ultimate facts essential to the determination of a cause involving different grounds of recovery, should be submitted.

Appeal from Guthrie District Court.—HON. J. H. APPLE-
GATE, Judge.

FRIDAY, JUNE 7, 1907.

ACTION to recover damages against a tenant of farm land for breach of stipulations of a lease with regard to keeping the premises in good condition; the complaint being that the tenant allowed them to be overrun with cockle burrs. Verdict and judgment for defendant. Plaintiff appeals.—*Reversed.*

Weeks & Hughes, for appellant.

S. B. Gwinn and E. R. Sayles, for appellee.

MCCLAINE, J.—The two material stipulations in the written lease, breach of which is complained of, were that the tenant would at the expiration of the lease yield up the possession to the owner in as good condition and order as when the same was entered upon by the tenant, losses by fire or inevitable accident and ordinary wear excepted; and that the tenant would keep said premises free from brush and burrs. The evidence showed, without substantial controversy, that when the premises were surrendered by the defendant to the plaintiff at the expiration of the lease they were badly infested with cockle burrs; but there was a sharp conflict in the evidence as to the condition in this respect when the defendant took possession. The errors complained of relate to the introduction of evidence for the defendant to the effect that there was a mutual mistake of the parties to the lease as to the condition of the premises when the defendant took possession, the giving of instructions as to the

measure of damages for breach of covenant to keep the premises free from burrs, and the refusal to submit special interrogatories asked by the plaintiff.

I. The defendant pleaded as a defense that, at the time of entering into the contract of lease, it was understood and believed by both parties that the premises were free from cockle burrs, whereas, in truth and in fact they were infested with such cockle burrs, and the seeds thereof; and that there was a mutual mistake of fact with reference thereto which prevented the minds of the parties meeting in an obligatory way as to the terms of the contract. Plaintiff's objection to the testimony, offered in behalf of defendant, that neither he nor the agent acting for the lessor had knowledge when the lease was executed that there were cockle burrs on the premises, was overruled. Subsequently, the plaintiff moved to strike out the evidence with reference to mutual mistake and misapprehension of this fact, as pleaded by the defendant, and this motion was overruled; but in the instructions the court withdrew the issues as to mistake and misapprehension, and directed the jury not to consider them. As nothing had intervened between the rulings on the admission of the evidence and the giving of the instructions to justify the withdrawal of the issues from the jury, if the pleading raised any such issues which could under proper evidence have been submitted, we must assume that the trial court reached the conclusion, which is insisted upon by counsel for appellant as correct, that the allegations as to mistake and misapprehension did not raise any issues proper for determination in the case, and counsel therefor insist that the ruling of the court on objections to the testimony and on the motion to strike out were erroneous and prejudicial.

As to the ruling on the motion, were that the only question, we should probably have to say that it was technically correct, for the reason that by the motion plaintiff asked to have excluded from the jury not only the evidence as to the

1. ERRONEOUS
ADMISSION OF
EVIDENCE:
instruction.

knowledge of the parties when the lease was executed with reference to the condition of the premises, but also testimony with reference to the actual condition at that time; and, as the actual condition was material on the issue as to whether defendant returned the premises in as good condition as when they were taken possession of by him, the evidence as to condition at the time possession was taken was material. But the motion did call the court's attention, before the arguments to the jury were commenced, to the insufficiency of the evidence with regard to mistake and misapprehension, and by allowing counsel for the defendant to argue to the jury, as he did, the fact of mistake, the evidence on that subject was emphasized so that it is doubtful whether the instruction removed the prejudice resulting from the evidence, which it must now be conceded was improperly introduced on that subject. It is true that error in the admission of evidence has often been held to be sufficiently counteracted by an instruction to the jury not to consider the evidence thus erroneously admitted; but on the other hand, it is well settled that erroneous admission of evidence may be so fundamentally prejudicial that an instruction not to consider it will not sufficiently counteract the error. *Hall v. Chicago R. I. & P. R. Co.*, 84 Iowa, 311; *State v. Helm*, 97 Iowa, 378; *Jones v. United States Mut. Acc. Ass'n*, 92 Iowa, 652; *Robinson v. Cedar Rapids*, 100 Iowa, 662.

But we have more here, on the question of whether any prejudice from the erroneous introduction of testimony was cured, than a mere abstract consideration of whether the jury

2. NEW TRIAL: were likely to disregard the evidence in view
evidence. of the instruction. In support of an allegation in the motion for a new trial of misconduct of the jury, it was shown that the jurors, in the discussion of the case, referred to this evidence, not as having been excluded from their consideration by the instruction, but as affecting their conclusion as to which party should succeed. The testimony of jurors tending to show that they did con-

sider and give weight to evidence not properly before them for consideration is admissible in determining the question of misconduct. *Douglass v. Agne*, 125 Iowa, 67. Now, in view of the fact that counsel for defendant were allowed to press this matter upon the jury, and that the jurors considered it in reaching their verdict, we think it is clear that the instruction of the court did not remove the prejudice presumed to result from the introduction of the improper testimony, and such error in the introduction of testimony must therefore be regarded by us as sufficient ground for reversing the judgment.

II. The court instructed the jury, on the measure of damages, that, if plaintiff was entitled to recover, the amount of his recovery would be the difference between the reasonable rental value of the premises in the condition in which they were turned over by the defendant at the expiration of his lease, and what would have been the reasonable rental value of said premises had they been in the condition in which the defendant under his contract should have surrendered them, estimating such difference, if any, for such length of time as the jury should find under the evidence would be required by reasonable and proper methods to put the premises in the condition in which the defendant agreed they should be when turned over by him at the expiration of the lease. There was a controversy between the parties in the early part of the trial, as to whether the damages should be measured by depreciation in market value of the premises due to their being infested with cockle burrs, or the depreciation in rental value on that account, and the court allowed the plaintiff, over defendant's objection, to introduce some evidence as to the difference in market value, and excluded evidence for plaintiff as to the effect of this condition upon the use and productiveness of the farm during the next season. We think the rule announced in the instruction to be correct. The farm was not being held for sale, but

8. LANDLORD AND
TENANT: fail-
ure to culti-
vate: measure
of damages.

for rent, and any temporary detriment to it for the use to which it was being put should be compensated on the basis of the loss in rental value on that account. We have held that, in case of the destruction of a meadow by fire, the measure of damages is the loss and expense involved in restoring the meadow to its original condition. *Black v. Minneapolis & St. Louis R. Co.*, 122 Iowa, 32; *Bradley v. Iowa Central R. Co.*, 111 Iowa, 562. It is not necessary to say that the rule as to measure of damages adopted by the court in this case is necessarily the only rule which could be properly adopted in any case. It is sufficient to say that it was a proper rule in accordance with which the damages might be estimated, under the issues, and in the light of the evidence. The court did not err, therefore, in refusing an instruction requiring the jury to determine the damages, if any, on the basis of depreciation in market value.

It does not very satisfactorily appear that by this change of view on the part of the court the plaintiff was prevented from introducing any evidence he may have had with reference to the depreciation in rental value; but in one respect plaintiff was certainly prejudiced by this change of view, for his first witness was Prof. Pammel of the State Agricultural College, who was asked as an expert, having duly qualified as such, to say how long it would take to subdue the cockle burrs so that the premises could be reasonably used for farming purposes, having in mind farms as they ordinarily existed in the neighborhood in which these premises were situated; and defendant's objection to this question was sustained. The evidence thus solicited was very material, for on the theory of damage by reason of depreciation in rental value, the time during which the depreciation would continue was an important element. It is true that subsequently this witness and another testified in general as to the course of procedure necessary to eradicate cockle burrs, and indicated substantially the time required; but this evidence did not have relation specifically to farms

4. SAME:
evidence.

under the conditions existing in the neighborhood. On the theory on which the case was subsequently submitted to the jury, the exclusion of the evidence of Prof. Pammel was erroneous.

But in another respect the court committed error, not only in the giving of this instruction as to the measure of damage, but also in the exclusion of evidence bearing thereon.

5. SAME:
instruction.

It will be observed that the instruction, already set out in substance, takes no account of any labor or expense necessarily required in restoring the premises to good condition. Had the evidence been such as to indicate that in the usual method of farming the cockle burrs would disappear as an objectionable feature of the premises affecting the rental value after a period of time, then the instruction might have been proper as indicating the depreciation in rental value for that period of time as the basis of recovery; but the evidence tended to show that a special course of treatment of the land would be required to eradicate the cockle burrs, and, so far as this course of treatment involved additional labor and expense, it should have been taken into account in determining plaintiff's damage. On the contrary, the court not only failed to recognize this element of damage in the instructions, but sustained defendant's motion to strike out the testimony of one of plaintiff's witnesses with reference to the value of grass seed furnished by him to a succeeding tenant to seed a portion of the land for the purpose of eradicating the cockle burrs. We think the testimony was material and pertinent, so far as it tended to show expense only necessary by reason of defendant's breach of contract, and should not have been stricken out, and, in view of there being such testimony in the record, the court should have instructed on the subject of expense necessarily incurred by plaintiff in restoring the farm to as good condition in this respect, which would not otherwise have been involved in good farming.

III. As already indicated, plaintiff relied on a breach

of two specific covenants on the part of defendant in the lease. He also alleged breach of a condition, which we do not find specifically embodied in the lease, to farm the

6. SPECIAL INTER-
ROGATORIES.

premises in a husbandlike manner. These three allegations of wrong on the part of the defendant resulting in damage to plaintiff were submitted to the jury, and the plaintiff asked that the court also submit four special interrogatories, by the answers to which the jurors were to indicate: First, whether defendant violated his covenant to cultivate and keep the premises free from burrs; second, whether there was an increased, unusual, and excessive growth of cockle burrs between the time defendant took possession of the premises and the time when he surrendered them, caused by the negligent and improper manner in which he used and cultivated said premises; third, whether any excessive growth of cockle burrs during the term of the lease injured the premises; and, fourth, whether defendant surrendered the premises at the end of the lease in as good order and farming condition as when he received possession thereof, loss by fire and inevitable accident and ordinary wear excepted. In view of the three separate claims made in behalf of plaintiff, we think these special interrogatories should have been submitted. It is true they were not determinative of the case under all the issues; but they did bear directly on the determination of specific issues, and called for findings as to ultimate facts essential to the determination of such issues. That such interrogatories ought to be submitted when asked, in a case like this, involving different grounds of recovery, is well settled. *Pratt v. Chicago, R. I. & P. R. Co.*, 107 Iowa, 287; *Trumble v. Happy*, 114 Iowa, 624; *Decatur v. Simpson*, 115 Iowa, 348.

The judgment of the trial court is reversed.

BARNEY THOMPSON V. G. E. NORMANDEN, Appellant.

Drains: LICENSE: REVOCATION. One who constructs tile drains
1 for his own exclusive benefit, which connect with and discharge the water into the drain of an adjoining owner on his land, under an agreement that the same may be maintained so long as satisfactory to the adjoining owner, cannot enjoin an interference with the continued maintenance and use thereof.

Same: ESTOPPEL. Estoppel cannot be predicated on a mere per-
2 mission to use the land of another for drainage purposes.

Appeal from Hamilton District Court.—HON. J. H. RICHARDS, Judge.

FRIDAY, JUNE 7, 1907.

SUIT in equity to restrain the defendant from interfering with a tile drain extending from the plaintiff's land onto his own land. There was a judgment for the plaintiff, from which the defendant appeals.—*Reversed.*

D. C. Chase and Wesley Martin, for appellant.

J. L. Kamrar, for appellee.

SHERWIN, J.—A rehearing was granted in this case, and the opinion on the original submission, found on page 108 N. W. 315 is withdrawn. The parties to this action are adjoining landowners. The plaintiff claims that in 1892 he entered into an oral contract with the defendant, by the terms of which he was granted the right to lay tile on the defendant's land connecting with tile which the defendant had already put there, and to tile his own land, so that the water collected therefrom could pass off through this tile. The evidence shows that a swale or slough runs across the defendant's land extending into the plaintiff's land above for some

little distance. Prior to the time of the alleged agreement, the defendant had tiled his land up through this swale to within a short distance of the boundary line between him and the plaintiff. Just how close to the boundary line his title extended is in dispute; the plaintiff's testimony tending to show that it stopped about fifteen rods from the line, and the defendant's testimony tending to show that it extended clear to the line. It is a fact, however, that the defendant had put five-inch tile up through the swale on his own land to a point within a few rods of the line between the parties, and that connecting therewith he had put in a considerable amount of three-inch tile. The plaintiff claims that the defendant orally agreed that he might take up the three-inch tile that he had so laid, replacing it with four-inch tile, and extending it through the defendant's land to his own land, and far enough on his own land to gather the water naturally draining in the direction of the defendant's land; that, in pursuance of such agreement, he took up the three-inch tile and put the four-inch tile in place thereof; and that afterwards, and shortly before the bringing of this suit, the defendant obstructed the drain at the boundary line between them, causing the water to flow back upon the plaintiff's land.

The only serious controversy in the case which we need notice is over the terms of the agreement between these parties. There is no question but that the plaintiff tiled the ground as he claims; but the appellant contends that it was specially agreed between them at the time that the plaintiff's right to discharge water from his own drain into the appellant's drain should cease whenever the appellant saw fit to terminate the arrangement. On the other hand, the appellee claims that the license was without any limitation, and that it is irrevocable because of the material furnished and work done by him in pursuance of the agreement. We need not determine whether the labor performed by the plaintiff and the material furnished by him in pursuance of such agreement were of such nature as to create an irrevocable license

in the absence of any other controlling question; for we are abidingly satisfied that the weight of credible evidence supports the appellant's contention as to their agreement, and that the plaintiff made the improvement exclusively for his own benefit, with the distinct understanding that the arrangement should continue only so long as it was satisfactory to the appellant. If this be true, the question of an irrevocable license is not in the case, and a discussion thereof would be of no benefit.

There can be no estoppel in the case by reason of acquiescence for a period of more than ten years, because the plaintiff's use of the appellant's land was permissive and an estoppel cannot be predicated on such use. Under the agreement between these parties the appellant had the clear right to shut off the plaintiff's use of his drain at any time he saw fit, and the trial court erred in finding otherwise.

The judgment is reversed, and the case remanded for a decree not inconsistent with this opinion.—*Reversed.*

CHRISTINA MEYER, Executrix, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Railroads: CROSSING ACCIDENT: CONTRIBUTORY NEGLIGENCE: EVIDENCE. All that is required of a traveler in approaching a railway crossing is that he exercise ordinary care in looking and listening for approaching trains within a reasonable distance of the crossing, and when he stops and looks and listens it is for the jury to say whether he was in the exercise of ordinary care. Evidence held sufficient to take the case to the jury on the question of contributory negligence.

Appeal from Washington District Court.—HON. W. G. CLEMENTS, Judge.

FRIDAY, JUNE 7, 1907.

SUIT to recover damages for the negligent killing of the plaintiff's husband by defendant's train at a public highway

crossing. There was a verdict and a judgment thereon for the plaintiff, from which the defendant appeals.— *Affirmed.*

Carroll Wright, J. L. Parrish, and Eicher & Eicher, for appellant.

S. W. & J. L. Brookhart, for appellee.

SHERWIN, J.— The injury which resulted in the death of C. A. Meyer occurred at a public highway crossing on the 26th day of December, 1904, about ten o'clock in the morning. The defendant's railroad at and near the place where the injury occurred runs east and west, and the public highway west of the crossing and south of the defendant's road runs east and west practically parallel with the defendant's road. On the day in question, Meyer and his wife were riding eastward on this public highway toward the crossing in question, and, while attempting to cross the defendant's track, the buggy in which they were riding was struck by one of the defendant's east-bound trains, and Mr. Meyers received injuries which soon thereafter caused his death.

The sole question presented for our consideration in this case is whether there was sufficient evidence of the deceased's freedom from contributory negligence to sustain the verdict. There is a fill about three hundred and fifty feet long west of the crossing in question which runs from nothing to fourteen feet above the low place in the public highway, and west of the fill the road passes through a cut which is deep enough to completely obstruct the view of an approaching train from a person looking westward from such low place in the public highway. The traveled highway, however, runs over the hill through which this cut is made, and from said highway on the hill there is an obstructed view of the defendant's road west for a considerable distance. From any point between the crossing and a point from fifty to seventy-five feet south thereof, there is an unobstructed view of the defendant's track for nine

hundred to one thousand feet west. The plaintiff was the only witness testifying as to the conduct of herself and husband in looking out for trains on the defendant road as they were approaching the crossing in question. She testified that when they reached the point about two hundred and twenty-five feet from the crossing, they stopped and looked and listened for trains. She further testified that they again stopped and looked and listened at a point from eighty-five to one hundred feet from the crossing, and, not hearing or seeing anything indicating the approach of a train, they went on, the horses moving slowly, and that during the time they were approaching the crossing they still looked and listened for trains. She still further testified that they did not know of the approach of the train in question until their team was right on the crossing, and that, when she discovered it, it was only about three hundred feet from them, and that no alarm signal was sounded by the engine until after she had seen the train. There is evidence tending to show that it was very foggy that morning and at the time of the accident, and that the fog materially obstructed the view. We are fully satisfied that the evidence touching the deceased's freedom from contributory negligence was sufficient to take the question to the jury and to sustain the verdict. Had it not been for the fog, it fairly appears that the train could have been seen from the place where the second stop was made, when it was four hundred or five hundred feet from the crossing. All the law requires of a traveler who is approaching a railroad crossing is that he exercise ordinary care in looking and listening for approaching trains within a reasonable distance from the crossing, and, when he looks and listens without stopping or stops and looks and listens, it is for the jury to say whether he was in the exercise of ordinary care under all of the circumstances developed upon the trial. There might be instances where the jury would be warranted in finding that such care was not exercised without stopping, and, on the other hand, it might well be said from the facts and cir-

cumstances shown on the trial that the care required by the law was fully exercised by looking and listening without stopping, and so in this case we think it was for the jury to determine whether the deceased in the exercise of the care required by the law should have made another stop between the crossing and the point where the last stop was in fact made. *Schulte v. Chicago, Milwaukee & St. Paul Ry. Co.*, 114 Iowa, 89; *Mackerall v. Railroad Co.*, 111 Iowa, 547; *Winey v. Railway Co.*, 92 Iowa, 622; *Hartman v. Railway Co.*, 132 Iowa, 582. What we have said about the sufficiency of the evidence discussed disposes of the appellant's contention that the verdict was contrary to the instructions of the court.

The appellant's motion to strike a part of the second amendment to the abstract filed by the appellee is sustained.

The judgment of the district court is *affirmed*.

JAMES SNYDER v. E. D. THOMPSON ET AL., Appellants.

New trial: DISCRETION. A motion for new trial is addressed to the

- 1 discretion of the court, but this is a legal discretion and must be exercised according to the rules of law, and where it appears that it has not been so exercised the order will be reversed.

Direction of verdict. Where there is a conflict in the evidence

- 2 touching a material question of fact the issue must be submitted to the jury.

Intoxication: ARREST WITHOUT WARRANT: EVIDENCE. An officer has

- 3 no authority to make an arrest for drunkenness without a warrant, unless at the time of arrest the person shall be found in a state of intoxication. The evidence in the instant case regarding intoxication was in such conflict as to require submission of the issue.

Arrest without warrant: JUSTIFICATION: BURDEN OF PROOF. Ex-

- 4 cept as provided by statute an officer cannot rightfully make an arrest without a warrant; and when he assumes to act without a warrant, he has the burden of proof on the question of justification, in a suit for false imprisonment.

Appeal from Hardon District Court.—HON. W. D. EVANS,
Judge.

FRIDAY, JUNE 7, 1907.

SUIT to recover damages for false imprisonment. There was a trial to a jury and a verdict for the defendants, which was set aside on plaintiff's motion, and the defendants appeal.—*Affirmed.*

Albrook & Lundy, for appellants.

Chas. A. Rogers and *N. S. Carpenter*, for appellee.

SHERWIN, J.—On April 26, 1905, the defendants, Thompson and Boylan, were, respectively, mayor and marshal of the incorporated town of Hubbard, Iowa. On the evening of that day Thompson orally directed the marshal, Boylan, to arrest and put the plaintiff in jail, stating that it had been reported to him that plaintiff was drunk and had been disturbing the peace and quiet of the town. Pursuant to said oral order to arrest the plaintiff, the marshal procured two assistants, and then, without warrant or other process, entered the home of the plaintiff and there arrested him, took him therefrom and placed him in the town jail, where he remained over night. On the following day plaintiff was arraigned in the mayor's court and pleaded guilty to having been drunk on the 20th day of April, 1905, but denied that he was drunk on the 26th day of April, 1905. No information was filed before the magistrate until the morning of April 27th, and no warrant of arrest was ever issued. At the close of all of the evidence both of the defendants moved for a directed verdict, which motion was overruled and the ruling duly excepted to. After the verdict had been returned the plaintiff filed a motion to set aside the same and for a new trial, alleging various grounds therefor, some of which will be more particularly noticed hereinafter.

This motion was sustained generally, and the appeal is taken from the order granting a new trial.

It is a rule of long standing in this State that a motion for a new trial should be addressed to the sound discretion of the court, and such discretion will not be interfered with by this court, unless it is manifest that it has been improperly exercised. *Pickering v. Kirkpatrick*, 32 Iowa, 163. But this discretion is a legal one, and must be exercised according to the rules of law, and, where it becomes apparent to an appellate tribunal that it has not been so exercised, the order will be reversed without hesitation. It has also been said that the court will be more reluctant to disturb the order of the trial court where the motion for a new trial is granted. *Peebles v. Peebles*, 77 Iowa, 11; *Hopkins v. Knapp & Spaulding Co.*, 92 Iowa, 212.

The appellants' first contention is that their motion for a directed verdict should have been sustained because of insufficient evidence to warrant a verdict for the plaintiff.

2. DIRECTION OF VERDICT. They base this contention on the proposition that, before the plaintiff can recover, he must show the imprisonment; and, secondly, the unlawfulness thereof, and they then contend that there is no sufficient evidence to sustain the latter of the two propositions. We have examined the record in this case with care, and reach the conclusion that there is such a conflict of evidence therein on every vital issue presented by the pleadings that the court could not properly have sustained the appellants' motion. On the question whether the plaintiff was in fact intoxicated on the 26th day of April, there is a sharp conflict in the testimony, and it would manifestly have been error to direct a verdict on that branch of the case. The question whether the defendants had reasonable grounds for directing the arrest of the plaintiff and for making it was peculiarly a question for the jury; and in our judgment there was sufficient evidence touching this question to take it to the jury for its determination.

It must be borne in mind in considering this case that at the time the arrest was made, and during the period of imprisonment for which damages are claimed, no information had been filed against the plaintiff, and no warrant had been issued for his arrest.

8. INTOXICATION:
arrest without
warrant:
evidence.

Code, section 5196, provides that a peace officer may make an arrest without a warrant " (1) for a public offense committed or attempted in his presence; (2) where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it." So far as we are advised, this section of the statute furnishes the only general authority for such an arrest as was made in this case, and subdivision 2 thereof, in exact language, points out the essentials to give an officer authority to make an arrest without a warrant. In the first place, a public offense must have been committed, and, in addition thereto, the officer making the arrest must have reasonable ground for believing that the person to be arrested committed it. Stated differently, if no public offense has in fact been committed, the section furnishes no justification for making the arrest. In the instant case the evidence as to intoxication is in conflict, as we have seen, and if, as a matter of fact, the plaintiff was not intoxicated on the 26th day of April, we do not see how the defendants could justify under this statute. Code, section 5198, does not furnish any justification for either the magistrate or the officer who served the warrant. It is as follows: "A magistrate may orally order a peace officer . . . to arrest any one committing or attempting to commit a public offense in the presence of such magistrate, which order shall authorize the arrest." There is no pretense in this case that the mayor saw the plaintiff in an intoxicated condition on the day in question, nor is there any pretense that Boylan saw him until he went into his house for the purpose of making the arrest. Code, section 2402, provides that, "if any person shall be found in a state of intoxication, he is guilty of a misde-

meanor, and any peace officer shall without a warrant take him into custody and detain him in some suitable place until an information can be made before a magistrate and a warrant of arrest issue." To enable justification under this section of the Code, the defendants would necessarily have to prove that the plaintiff was found in a state of intoxication, and if it be conceded that they may go to a man's private dwelling house for the purpose of finding him in such condition, the conflict in the evidence to which we have heretofore referred is such that the question was for the jury.

The court instructed that the burden of proof was upon the plaintiff to prove that he was not found intoxicated within the meaning of the law at the time of his arrest, nor immediately preceding the same on that day.

4. ARREST WITHOUT WARRANT: justification: burden of proof. Error in this instruction was one of the plaintiff's grounds for setting aside the verdict, and

the correctness of the instruction is one of the chief questions presented for our determination. We think it announced an incorrect rule of evidence, and in discussing this proposition the distinction between false imprisonment and malicious prosecution must be noted. It is generally said that they are made up of different elements, "enforced by different forms of action, are governed by different rules of pleading, evidence, and damages, and are subject to different defenses." 19 Cyc. 321. A cause of action in false imprisonment does not primarily, apart from justification, depend upon mental attitude. Malice or want of probable cause is the whole gist of malicious prosecution. *Boaz v Tate*, 43 Ind. 60. False imprisonment lies only for an interference with personal liberty without legal authority. *Haskins v. Ralston*, 69 Mich. 63 (37 N. W. 45, 13 Am. St. Rep. 376). But, if a valid or apparently valid power to arrest is enforced without probable cause and with malice, the remedy is by suit for malicious prosecution. *Colter v. Lower*, 35 Ind. 285 (9 Am. Rep. 735). In Bishop on Noncontract Law, section 212, it is said: "In false imprisonment proper, as

distinguished from malicious prosecution, malice is not required." It is a rule in this State that no officer may rightfully arrest a person without warrant except as provided by statute. *Young v. Gormley*, 120 Iowa, 372. And it would seem to follow without serious question that, where an arrest is so made, justification therefor must be pleaded and proven by the officer making the same. Judge Cooley, in his work on Torts (page 175) in discussing this question, says: "When the propriety of an arrest without process is in question, the problem always is how to harmonize the individual right to liberty with the public right to protection. Where process issues, the proceedings required in obtaining it constitutes a sufficient precaution against causeless arrests. The magistrate decides on the facts presented to him that sufficient reason exists. But, if one without this protection were to arrest upon his own judgment, he ought to be able, when called upon, to show that his judgment was warranted. To do this he should show either (1) a felony actually committed; and (2) facts that had come to his knowledge which justify him in suspecting the person arrested to be the felon; or (3) a felony being committed and an arrest to stay and prevent it." He further says: "This seems to be the least that can be required; . . . and, if one errs in these particulars, it is better that he be left to take the consequences than that they be visited upon an innocent party who is improperly arrested." In *Hicks v. Faulkner*, 8 Q. B. D. 167, it is said, "In false imprisonment the *onus* lies on the defendant to plead and prove affirmatively the existence of reasonable cause as his justification." The same rule is announced in the following jurisdictions: *Black v. Marsh*, 31 Ind. App. 53 (67 N. E. 201); *Sneed v. Bonnoil*, 166 N. Y. 325 (59 N. E. 899); *Edgar v. Burke*, 96 Md. 715 (54 Atl. 986); *Marshall v. Clever*, 4 Pennewill (Del.), 450 (56 Atl. 380); *Franklin v. Amerson*, 118 Ga. 860 (45 S. E. 698). See, also, on the same subject, 19 Cyc. 363, and cases therein cited. In 2 Bishop on Criminal Procedure, section 368, it

is said: "In matter of evidence, if the imprisonment is proved, its unlawfulness will be *prima facie* presumed; but authority may be shown by the defendant in justification, or it will be equally effectual if it appears among the proofs against him." The rule is also recognized in *Stewart v. Feeley*, 118 Iowa, 524.

Other grounds of the motion for a new trial have been argued, but the errors therein complained of are of minor importance, and we shall not extend this opinion by a discussion of them. It is manifest from what has already been said that the trial court was fully justified in setting aside the verdict, and the order is therefore *affirmed*.

J. ED. JOHNSON, v. BUFFALO CENTER STATE BANK, Appellant

Uncontradicted evidence: SUBMISSION OF ISSUE. Where the evidence in favor of a party having the burden of proof on an issue is in no way contradicted or impeached, the court may assume the fact relied upon as proven, and need not submit that question to the jury.

Banks and banking: CERTIFICATE OF DEPOSIT: BONA FIDE HOLDER: EVIDENCE. Under the Negotiable Instruments law it is competent for a *bona fide* holder, without notice, in suing on a certificate of deposit payable to the cashier of a bank and by him as cashier endorsed to plaintiff, to show that the endorser was in fact cashier of the bank and was acting in that general capacity in transferring the instrument; but it is not competent for the bank to show as against such *bona fide* holder that he was making use of his official title and authority in his individual interest.

Bona fide holder: NOTICE OF DEFECTS. The *bona fide* holder of a certificate of deposit is not chargeable with notice of any infirmity in the instrument or defect in the title of the party negotiating the same, unless he had actual knowledge thereof, or knew such facts in relation thereto as would indicate his bad faith in accepting the same.

Appeal from Winnebago District Court.—HON. CLIFFORD
P. SMITH, Judge.

FRIDAY, JUNE 7, 1907.

ACTION on a certificate of deposit issued by the Clay County Bank of Felton, Minn., to "E. E. Secor, Cashier," and by indorsement of "E. E. Secor, Cashier," transferred to the State Bank of Dows, and by that bank to plaintiff. It is alleged that Secor, to whom as cashier the certificate of deposit was issued, and by whom it was indorsed, was the cashier of the defendant bank, and, acting in that capacity, transferred the instrument to the State Bank of Dows. In the answer of defendant it is admitted that Secor was its cashier at the time of the transaction in question; but it is alleged that the Clay County Bank was a co-partnership of which Secor was a partner, and that the certificate was made use of by him for his own personal benefit, and not for the use or benefit of the defendant bank, which received no consideration therefor, and that Secor acted without the knowledge or consent of any officer or agent of the defendant bank and without its authority. It is alleged also that the indorsement by "Secor, Cashier," was wholly by way of accommodation. By general denial the allegations of the petition that plaintiff became holder of the certificate of deposit before maturity for a good consideration and without notice of any defenses were put in issue. At the conclusion of the evidence introduced on the issues thus presented the court directed a verdict for the plaintiff, and from the judgment on that verdict defendant appeals.—*Affirmed.*

J. A. Brown, for appellant.

E. P. Andrews, for appellee.

MCCLAINE, J.—The first contention for the appellant is that the question whether plaintiff was a holder of the

certificate of deposit in due course — that is, a purchaser for value before maturity without notice of any defenses — should have been submitted to the jury. But it is conceded that there was sufficient evidence for the plaintiff on this issue to support a verdict, and that this evidence is wholly uncontradicted. The rule in this State seems to be that, where the evidence in favor of the party having the burden of proof on an issue is in no way contradicted or its credibility affected by impeachment, the court may assume the fact relied upon to be proven, and need not submit the question to the jury, for a verdict against such evidence would be set aside. The case of *Joy v. Diefendorf*, 130 N. Y. 6 (28 N. E. 602, 27 Am. St. Rep. 484) is relied upon for appellant as holding that, where the transferee of a negotiable instrument has the burden of proving *bona fides* and relies upon his own testimony as a witness in proof of that fact, the question should be submitted to the jury, although his testimony is uncontradicted. This case seems not to be in accordance with the rule in this State above indicated. Furthermore, it is not parallel with the case at bar, for we have in the record, not only the testimony of plaintiff, Johnson, in support of his *bona fides*, but the detailed testimony of the officer of the State Bank of Dows, through whom the certificate of deposit was sold to the plaintiff. This testimony shows a *bona fide* transfer before maturity for value and without notice, and the officer testifying as a witness is, so far as the record appears, wholly disinterested. We think that, had the question been submitted to a jury, there could have been no other finding than that plaintiff was a *bona fide* holder without notice before maturity on good consideration, and therefore in this respect there was no error in directing a verdict.

The next contention is in substance and effect that Secor was, in fact, negotiating the certificate of deposit in his own interest, and not for defendant bank, and it is insisted that, as the name of the defendant bank is not inserted in the in-

strument as payee, nor placed upon the back of it as indorser, nothing was imported in the transaction involving liability on the part of defendant bank. But it is conceded in the record that Secor at the time the certificate was issued payable to him as cashier, and at the time it was indorsed by him as cashier, was in fact the cashier and managing officer of the defendant bank, and that the certificate was transferred apparently as a part of the business of the bank. In section 42 of the Negotiable Instruments Act (29th General Assembly, Code Supp. 1902, section 3060a42), it is provided: "Where an instrument is drawn or indorsed to a person as 'cashier' . . . of a bank, . . . it is deemed *prima facie* to be payable to the bank . . . of which he is such officer, and may be negotiated by either the indorsement of the bank, . . . or the indorsement of the officer." Under this provision it was competent for the plaintiff to show that Secor was the cashier of the defendant bank, and was acting in that general capacity in transferring the instrument, and as against plaintiff, a *bona fide* holder without notice, it was not competent for the defendant bank to show that as a matter of fact he was making use of his official title and authority in his own individual interest. Even were this not so, it clearly appears that the State Bank of Dows paid for the certificate of deposit by a Chicago draft payable "to the order of E. E. Secor, Cashier," and that the proceeds of this draft became a part of the funds of the bank. It seems to us that, as against the plaintiff, no further inquiry could be permitted. We must look at the whole transaction with reference to the position of plaintiff, an innocent holder for value. He was not charged with notice of the dealings between "Secor, Cashier," and the defendant bank which he represented, and in whose interest he appeared to act. Under the section of the Negotiable Instruments Act just quoted the relations of the parties were not different from what they would have been had the certificate of de-

2. BANKS AND
BANKING:
certificates
of deposits:
bona fide
holder: evi-
dence.

posit been issued to the defendant bank and indorsed in its name by Secor, acting as its cashier.

Some circumstances are relied upon for appellant as proper to have gone to the jury as imputing notice to plaintiff that the certificate of deposit was not negotiated in the

8. BONA FIDE
HOLDER: no-
tice of
defects.

regular course of business by the defendant bank. It is said, for instance, that the certificate bears eight per cent. interest, which is unusual in banking transactions, and that it is also unusual for a bank to transfer a certificate of deposit instead of presenting it for payment. It must be remembered that plaintiff, a holder in good faith for value, is not chargeable with mere inferences which might be drawn from the nature of the transaction. In section 56 of the Negotiable Instruments Act, above referred to, it is provided: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Certainly the facts relied upon for appellant have no tendency to indicate bad faith. The evidence is conclusive that plaintiff had no knowledge whatever or suspicion that the instrument was not transferred in perfect good faith, and in the usual course of business to the State Bank of Dows from which he procured it. There was nothing, therefore, on which a verdict for the defendant on the ground that it was not bound, by the act of its cashier in transferring the instrument, could have been supported.

The judgment is *affirmed*.

134	736
140	197

C. G. MIKESELL V. WABASH RAILROAD Co., Appellant.

Railways: KILLING OF STOCK: FAILURE TO FENCE: PROXIMATE CAUSE.

- 1 Where stock strays upon a right of way by reason of the company's failure to properly fence the same and by some act of the employés of the company, whether negligent or otherwise, it is caused to run into a bridge and is thereby injured, the failure to fence together with the act of the employés constitutes the proximate cause of the injury for which the company is liable.

Same: EVIDENCE. The fact that stock was in a pasture a short

- 2 time before it was killed upon an adjoining right of way, and that at one point there was no right of way fence, will, in the absence of direct evidence upon the subject, justify the conclusion that it went upon the right of way through the opening rather than that it jumped over a sufficient fence at another point.

Evidence: CONCLUSION: PREJUDICE. Although evidence is errone-

- 3 ously rejected as a conclusion, prejudice will not result where the witness is subsequently permitted to detail the facts upon which the supposed conclusion is based.

Killing of stock: SUBMISSION OF ISSUES. Where a petition alleged

- 4 failure to maintain a sufficient right of way fence and the evidence is undisputed that for some distance and for some time no fence whatever had been maintained, submission of the issue of failure to keep the fence in repair was without prejudice, even though there was no allegation to that effect; as proof of injury to stock by reason of a lack of fence, in connection with an operation of the road, made a *prima facie* case, and the burden was upon the company to establish the erection of a sufficient fence.

Appeal from Marion District Court.—HON. JAS. D. GAMBLE, Judge.

FRIDAY, JUNE 7, 1907.

ACTION for double value of a mare alleged to have been injured through the defendant's failure to maintain a suffi-

cient fence along its right of way. Judgment was entered as prayed. The defendant appeals.—*Affirmed*.

Kinkead & Mettzer, for appellant.

Hays & Amos, for appellee.

LADD, J.—The defendant's railroad passes through the farm of thirty-eight acres belonging to plaintiff's mother from the northwest to the southeast, leaving about four acres on the south side of the right of way. There is a cut where it enters at the northwest, so that the south side is about fifteen feet above the level, and the north not so high. The road is graded up from that point toward the southeast to a bridge or tressel about three hundred feet distant. This grade is about fifteen feet above the general surface. A creek runs along the north side of the right of way and parallel with it. The right of way fence north of the track for a distance of two or three hundred feet had been washed out about a year before, and had not been repaired or replaced. In the morning of April 12, 1905, plaintiff turned a mare and colt into his pasture north of the railroad, and, after a while, noticed that they were on the right of way. The evidence on the part of plaintiff tended to show that when he called to the horses they threw up their heads, looked towards him, and then whirled and went on the railroad track toward the east; that immediately thereafter a hand car came along the track from the northwest, with several men on it, holloing, and did not stop until the mare ran into the bridge; that the horses were running their best, and the hand car followed about as fast to a point about sixty yards from said bridge. The witnesses agree that the horses could have passed from the cut northwest of the bridge to another southeast of it without going on the track; but, while plaintiff testified that the grade extended so near the fence that an animal could hardly get through, and that the north side was strewn with

rocks and ties, defendant's witnesses were certain there were no obstacles in the way. The evidence in behalf of defendant was that, as soon as the men on the car saw the horses, they stopped it; that the horses were then standing, and two of the men alighted and started them up with a view of getting them off of the way; that they walked along till at the corner of the cut, and then went on the track and trotted from there to the bridge; that after starting them nothing more was done by the section-men; that the car was brought along behind them and stopped one hundred and seventy-five yards or more before reaching the bridge.

From the evidence as thus epitomized, it is apparent that several conclusions were open to the jury: (1) That the mare was frightened onto the bridge by the approach of the hand car, or (2) by the noise of the men riding thereon; (3) that owing to the grade, with rock and ties on the ground, she went from the side on the track as a result of being started in that direction by defendant's employés, or (4) that she might have kept the side of the way, but went on the track and into the bridge on her own volition, and uninfluenced by being started by the employés in that direction. The bare statement of the first two furnish sufficient answer to the appellant's contention that there was not sufficient evidence to carry the case to the jury. True, there was no collision between the car and the mare. Nor was this essential to recovery. The object in requiring the right of way of a railroad to be fenced is to protect stock from injury from the operation of the railroad. Possibly a railway company may also be liable for stock, injury to which is due to constructing its road-bed and track so as to render it, when not properly graded, peculiarly dangerous to such animals as may come thereon; but that question, though mooted in argument, is not involved in this action. The design of the Legislature was not to cast on the railroad companies burdens greater or different than on others in like situation, but to

1. RAILROADS:
killing of
stock: failure
to fence:
proximate
cause.

require them to protect others against those dangers to stock peculiarly incident to the business of operating a railroad. This being so, the matter of negligence of its employes in such operation is immaterial. *Liston v. Railway Co.*, 70 Iowa, 714; *Meeker v. Railway Co.*, 21 Or. 513 (28 Pac. 639, 14 L. R. A. 841, 28 Am. St. Rep. 758). The companies will not be held for damages resulting from a catastrophe of nature or due alone to the eccentricity of the particular animal, even though this happen when the animal is on the right of way owing to an omission to fence. Why? The operation of the railroad thereon, which distinguishes the right of way from lands of other adjoining owners, had nothing to do with the injury. It was as likely to happen had the animal been on the lands of a neighbor as in the right of way. This proposition was touched in *Young v. Railway*, 44 Iowa, 172, where it was said, by way of illustration, that if an animal should be killed by lightning, or in a frolic should run into a bridge and be injured, the company would not be liable, for it "would have had no reason to apprehend the occurrence of an injury in that way." In giving this reason the writer of the opinion must have had in mind a condition of the right of way in itself, when unguarded, which would be negligent as to trespassing animals, for certainly, in actions for damages to stock owing to the failure to maintain a sufficient fence, no question of foresight is involved. The matter of foresight has been disposed of by the Legislature in enacting that: "Any corporation operating a railway, and failing to fence the same against live stock running at large and maintain proper and sufficient cattle-guards at all points where the right to fence or maintain cattle-guards exists, shall be liable to the owner of any stock killed or injured by reason of the want of such fence or cattle-guards for the full amount of damages sustained by the owner on account thereof, unless it was occasioned by his wilful act or that of his agent; and to recover

the same it shall only be necessary for him to prove the loss of or injury to the property." Section 2055, Code.

The inquiry is that of sequence, not of foresight, and is directed to the determination of whether the damages to stock as proven are the proximate result of the failure to fence in connection with the operation of the road. The rule deduced in *Young's* case makes this clear, for it was there announced thus: "When, then, may it be said that an animal is injured by reason of a want of a fence within the meaning of the statute? It is when the want of a fence in connection with the acts of the defendant is the proximate cause of the injury." This is referred to with approval in *Ashbach v. Railway*, 74 Iowa, 248, and in both cases the defendant was adjudged liable, though in neither had there been a collision, and in each the horse was merely frightened by an approaching train so that it ran into a bridge. The entire subject is somewhat elaborately considered in *Meeker v. Railway*, *supra*, and the like conclusions reached. The section-men, running a hand car over the track, were engaged in the operation of the road. *Larson v. Railway*, 91 Iowa, 81; *Chicago, M. & St. P. R. Co. v. Artery*, 137 U. S. 507 (11 Sup. Ct. 129, 34 L. Ed. 747). The use of such car is peculiar to railroading, and when in motion is quite as likely to frighten animals within the right of way as moving trains. If, then, the plaintiff's mare got on the right of way because of the failure of defendant to inclose it with a sufficient fence, and this, in connection with the fright caused by the approach or movement of the hand car on the track, or the sectionmen engaged in moving the car and acting therein within the scope of their employment, even though not negligent, was the proximate cause of the injury, the plaintiff is entitled to recover. If the mare went into the bridge solely of her own volition, and was uninfluenced by the conduct of the men or by their acts in connection with the movement of the hand car, the company is not liable. The test is not, as appellant contends, whether the result might have

been foreseen, but whether the injury is the natural and proximate consequence of the failure to properly fence in connection with the operation of the railroad.

II. Appellant contends there was no evidence that the horses escaped through the space where the fence had been destroyed. From the facts that the pasture was small, that

2. **SAME:** they were in the pasture shortly before seen
evidence. on the right of way, that the fence was intact elsewhere, together with the nature of the animals, the jury might have inferred that they passed on the right of way where there was no fence, rather than that they jumped over a sufficient fence, if any there was near by. See *Klay v. Railway*, 126 Iowa, 671.

III. A witness for the defendant was asked to state whether either of the horses was frightened by the approach of the hand car. The objection that this called for a conclu-

3. **EVIDENCE:** sion was sustained. The ruling, though er-
conclusion: roneous, *Yahn v. Ottumwa*, 60 Iowa, 429,
prejudice. was without prejudice. The witness subse-

quently testified that the horses did not start to walk or run until after the hand car had stopped, and the men had gotten off and started them. The facts, if as recited by the witness, left no other inference than that they were not frightened. Any prejudice resulting from an error in sustaining a similar objection to a like question propounded to another witness was obviated in the same way.

IV. It is conceded that the petition alleges a failure to maintain a sufficient right of way fence. Counsel for appellant argue that it does not allege negligence in keeping

4. **KILLING OF** such fence in repair, and therefore that the
stock: sub- court erred in submitting the case on that
mission of theory to the jury. If so, it was error with-
issues. out prejudice. The evidence that there was no fence along

the right of way for a space of three hundred feet, and that there had been none for more than a year, was undisputed. Proof that the mare was injured by reason of the want of a

fence, in connection with the operation of the railroad, made out a *prima facie* case for the plaintiff, and the burden was upon the defendant to establish the erection of a good and sufficient fence. *Brentner v. Railway*, 68 Iowa, 530; *Small v. Railway*, 50 Iowa, 338. This it utterly failed to do. If there was ever a sufficient fence at that place, the record fails to disclose the fact. The inquiry as to whether the defendant had been negligent in failing to keep it in suitable repair, in these circumstances, could not have prejudiced its case.

The judgment is *affirmed*.

PATRICK HUGHES, Appellant, v. SCHEUERMAN BROTHERS,
Appellees.

Nuisance: BLACKSMITH SHOP: ABATEMENT. It is the duty of one who locates a blacksmith shop within a few feet of the dwelling house of another to keep it clean from filth and odors likely to interfere with the comfortable enjoyment of the adjacent property; and if it is not capable of being so conducted it should be abated and the business removed.

Appeal from Mahaska District Court.—HON. B. W. PRESTON, Judge.

FRIDAY, JUNE 7, 1907.

ACTION in equity to enjoin the maintenance of an alleged nuisance. The district court dismissed the bill, and plaintiff appeals.—*Reversed*.

J. B. Bolton and D. C. Waggoner, for appellant.

L. C. Blanchard, for appellee.

WEAVER, C. J.—The plaintiff is the owner of a house and lot in Oskaloosa in which he has made his home for a period of some thirty years. The house stands near the east

line of the lot. About six years before the commencement of this suit the defendants erected a one-story brick building close to the line of plaintiff's lot on the east side, in which they established and have since carried on a blacksmithing business. It is the claim of the plaintiff that in the operation of this business as conducted large numbers of horses are brought to the shop, and stand in the street in front of the shop and in the lot immediately in its rear; that large numbers of men congregate in and about the shop indulging in loud and profane talk; that the regular work there carried on is productive of loud and deafening noises; that quantities of manure and other foul matter accumulate in and about the shop causing stench; that the fitting of heated shoes to the hoofs of horses causes offensive odors; that flies breed and swarm about the premises; and that from these and other similar annoyances arising from said shop, and the manner in which the said premises are maintained, the comfortable use and enjoyment of plaintiff's home is greatly interfered with and its value impaired. He therefore asks that the nuisance may be abated and enjoined.

The defendants admit that they are operating a blacksmith shop at the place mentioned, but deny that the same constitutes a nuisance. The evidence tends very strongly to sustain many, if not most, of the allegations of the petition. That defendants did not keep the premises as clear from manure and offensive odors as they should have done we are well satisfied. The place had been the subject of complaint to the city authorities. The city physician made an examination of the premises, and found them in such a condition as to be offensive to persons occupying the plaintiff's house. The shop floor was so constructed that the horse manure and urine would filter through the cracks into an excavation below, where they tended to fester and become a source of material annoyance and a menace to health. The plaintiff's kitchen was within three feet of the line, and the horses hitched on defendants' lots were within six feet of the

kitchen window. Resulting from this examination the city council passed a resolution reciting that the use of the lot as a hitching place had been productive of foul and offensive odors and source of much annoyance and discomfort to the people in that vicinity, and at times a menace to the health of the community, and ordered notice to be served upon defendants to clean and disinfect the place, and to cease using the property as a place for hitching horses. There was then some effort to cleanse the premises, but it does not seem to have been thorough or persistent.

The testimony offered by the defendant was largely that of witnesses who had been on or about the premises without noticing any offensive conditions. One of them conceded that the smell of horse manure did not bother him, and its presence next to his kitchen window or breakfast table would not be an annoyance. Another, a woman, who had at one time lived in plaintiff's house, thought she had no objection to the smell of horse manure unless it was "very strong." Others had not examined the premises, and knew very little of the essential conditions. Defendants also introduced evidence tending to show that plaintiff would at times get drunk; had been seen to drink beer on his back porch, kept hens on his lot, and had been known to have a sick horse there; but just what relevancy these things had to the issue being tried is not apparent upon the face of the record. Altogether we are satisfied that the case made by the plaintiff was one of merit, and that relief in some measure should have been granted. It is a matter of common observation that the business of general blacksmithing and horse shoeing is of such a character that, if the shop and premises are not kept with scrupulous care, many of the unpleasant results of which plaintiff complains are quite sure to follow. When located on an open lot of considerable size or surrounded by stables, or machine shops or buildings other than dwellings, those objectionable features may not afford ground for just complaint, but, when the artisan locates his

shop within a few feet of the windows and doors of the dwelling of another person, he is and should be bound to respect such person's right to the comfortable enjoyment of his own property. If the business is capable of being carried on without materially interfering with the comfortable use of the adjacent property by people of ordinary sensibilities, and without becoming a source of danger to the public health, it is the duty of the proprietor to so conduct it; and, if it is not capable of being carried on without such injurious results, it is his duty to abate the nuisance by ceasing the business or by removing it to some more suitable location. See *Bowman v. Humphrey*, 132 Iowa, 234, and cases there cited.

We are not prepared to say from the record before us that defendant's shop, when properly conducted, is necessarily a nuisance. The circumstances shown are not materially unlike those which this court considered in *Shiras v. Olinger*, 50 Iowa, 571. In that case the alleged nuisance was a livery stable, and, as in the present case, the evidence fairly showed the stable as kept to be a source of material annoyance and discomfort to the owners and occupants of neighboring residences. The trial court enjoined the further use of the property as a stable. On appeal the decree was modified to permit the stable to continue by taking proper precautions to prevent the annoying effects of which complaint had been made. The court there said: "But, inasmuch as a livery stable is not a nuisance *per se*, and it is not impossible that a change may be introduced which would obviate all objections, we think the decree enjoining the use absolutely should be so modified as to simply enjoin such use as we have found would be a nuisance." See, also, to like effect, *Faucher v. Grass*, 60 Iowa, 505. A blacksmith shop, like a livery stable, is not a nuisance *per se*. Whether it be a nuisance at any time depends upon its location, surroundings, and the manner in which it is conducted. Blacksmithing is a useful and important business, and it should not be hampered or burdened by unreasonable or unneces-

sary restrictions. On the other hand it is equally important that the owner of a home shall be protected in its proper and comfortable enjoyment. The record before us is not such that we can well prescribe the conditions under which the defendants shall be permitted to continue their business at its present location. Therefore, while we feel compelled to reverse the decree appealed from, we think it necessary to remand the cause to the trial court with directions that, if it finds that by the use of reasonable care in the conduct of the business and keeping the premises blacksmithing can be continued in the defendants' shop without materially interfering with the comfortable use of the plaintiff's residence, a decree be entered accordingly prescribing the conditions which the defendants must observe to that end. If, however, the trial court shall find that, even when all reasonable care and effort are used, the business at that place will still remain a nuisance, then an absolute injunction should be entered.

For the reasons stated, the decree of the district court is *reversed*.

R. W. PUGH, Assignee, Plaintiff, Appellant, v. JOHN JONES, Administrator Garnishee, Defendant, ET AL.

At Suit of Plaintiff and Appellant, v. Eugene Murphy and Richard Murphy, Defendants and Appellees. James M. McCune et al., M. Dwyer, and J. M. Dower, Interveners.

Garnishment: LIABILITY OF GUARDIANS. A guardian is not subject
1 to garnishment, but holds the funds after the death of his
ward, subject to an accounting to the administrator under
the direction of the court.

Same: LIABILITY OF ADMINISTRATOR. A creditor of heirs, whose
2 garnishment of an administrator is subsequent to a valid assignment by the heirs of their interest in the estate, acquires no right to the funds.

Appeal from Iowa District Court.—HON. O. A. BYINGTON,
Judge.

FRIDAY, JUNE 7, 1907.

GARNISHMENT proceedings, wherein plaintiff seeks to hold John Jones administrator of the estate of Mary L. Murphy, deceased, by reason of holding property or money belonging to Richard and Eugene Murphy, who are judgment debtors of plaintiff. The trial court discharged the garnishee, and plaintiff appeals.—*Affirmed.*

R. W. Pugh, for appellant.

J. M. Dower, for Defendants and Intervenors, appellees.

DEEMER, J.—One M. Dwyer was the guardian of Mary L. Murphy. The latter died May 28, 1904. After her death her guardian was garnished by plaintiff as a supposed debtor or as holding certain property belonging to Richard M. Murphy and Eugene A. Murphy, against whom plaintiff held judgments. These judgment defendants were heirs and legatees of Mary L. Murphy, deceased. D. M. Vannest, a son-in-law of Mary L. Murphy, was on the 13th day of June, 1904, appointed a special administrator of Mary L. Murphy's estate, but he never qualified as such. Thereafter, and on July 9, 1904, John Jones was appointed and qualified as administrator of her estate and on the 13th day of July, 1904, he too was garnished by plaintiff. Garnishment was also had on Vannest; but, as he never qualified and never held any money or property belonging to the heirs of the deceased, no attention need be paid to this garnishment. In the meantime, and before July 9, 1904, defendants R. M. and E. A. Murphy had assigned to various parties, interveners in this case, all their rights, titles, and interests in and to the estate of Mary L. Murphy, deceased. These assignments were each and all prior to the garnishments of the administrator

and seem to have been made in good faith, at least their *bona fides* is not questioned, so that this garnishment cuts no figure in the case.

But plaintiff contends that his garnishment of the guardian of Mary L. Murphy, although run after her death, was and is sufficient to hold the funds which might eventually

1. **GARNISHMENT:** pass to her heirs and legatees. It is a general
liability of
guardians.
rule that, when property is in *custodia legis*, the officer holding it is not liable to garnishment. Rood on Garnishment, section 27, and cases cited; *Martin v. Davis*, 21 Iowa, 535. When such right exists, it is in virtue of some statute, and, as there is no statute in this State authorizing it; there seems to be no authority for holding a guardian as garnishee. *Brooks v. Cook*, 8 Mass. 246; *Waite v. Osborne*, 11 Me. 185; *Short v. Moore*, 10 Vt. 446; *Stout v. LaFollette*, 64 Ind. 365.

Administrators and executors may under our statute (Code, section 3936), be garnished, but not guardians. But it is argued that Dwyer was no longer guardian when garnished, for the reason that his ward was then dead. But this is not so. Although the ward was dead, the guardianship continued for the purpose of settlement until a proper adjustment of the trust in the probate court. *State Fair Ass'n v. Terry*, 74 Ark. 149 (85 S. W. 87). After the death of the ward he was still an officer of court until discharged, and subject to its control and order. He was not holding the funds in his hands for the heirs of his ward, but his accountability was to the administrator of his ward's estate. He could not pay the money in his hands to the heirs of his ward with impunity, and could not close up his trust without accounting under the direction of the court to the administrator of his ward's estate. While for certain purposes it is held that the estate of an ancestor vests immediately in his heirs, yet this does not entitle them to the personal estate or to any aliquot part thereof unconditionally. It is all subject to administration, and passes as in this case from the guard-

ian to the administrator, and not directly to the heirs. But in this case it is plain that the guardian was holding the property when garnished as an officer of court, and, as such, was responsible to the court appointing him and to the administrator, and not to the heirs of his ward. Under no view could he be held as garnishee until discharged as guardian, and, as such discharge could not be had until he had turned the property over to the administrator of Mary L. Murphy's estate, he was manifestly not subject to garnishment.

When the proper administrator was garnished, the heirs had assigned all their interest in their ancestors' estate, and as plaintiff had no greater rights in and to the fund than his 2. SAME: liability of administrators. debtors had or would have had, he got nothing by that garnishment. The whole proposition here is answered by the suggestion that the property was in *custodia legis*, while in the hands of the guardian, although his ward was dead, and that there is no provision of statute authorizing the garnishment of a guardian. As we have said, the garnishment of Vannest is of no moment *Mechanics' Bank v. Waite*, 150 Mass. 234 (22 N. E. 915); and the garnishment of the administrator was after all the assignments had been made.

Further it is argued that the assignments to interveners are not sufficiently established. This is purely a fact question. Turning to the record, we find that they are properly proved.

The judgment discharging the garnishees is correct, and is *affirmed*.

LAURIE THYSSEN, by his next friend, CHRIS. THYSSEN, Appellant, v. THE DAVENPORT ICE AND COLD STORAGE COMPANY, Appellee.

New trial: AMENDMENT AFTER VERDICT. After a plaintiff has submitted his cause upon one theory and a verdict has been re-

turned against him, he cannot, by way of amendment to his petition, demand a new trial on a materially different theory.

Master and servant: NEGLIGENCE OF SERVANT. A master is not
2 liable for the act of his servant, done in the ordinary and usual performance of his duty, which results in an injury to a third person whose presence the servant neither knew nor had reason to know.

Same. Where a servant has no authority to employ another to
3 assist him in his work, the master is not liable for an injury to a stranger, resulting solely from the negligence of the assistant, on the ground that he was also a servant.

Appeal from Scott District Court.—HON. J. W. BOLLINGER,
Judge.

FRIDAY, JUNE 7, 1907.

ACTION at law to recover damages for personal injury. From a judgment for defendant upon a directed verdict, the plaintiff appeals.—*Affirmed.*

Ely & Bush, for appellant.

Lane & Waterman and *Alfred C. Mueller*, for appellee.

WEAVER, C. J.—On July 15, 1905, the defendant, being engaged in the ice business in the city of Davenport, sent out one of its delivery wagons in charge of an employé named Wagner. After starting upon the trip Wagner allowed his father-in-law, one Thomas, to get upon the wagon and ride with him and to assist in handling and delivering ice. The wagon having stopped in front of a house where a delivery was to be made, plaintiff, a child of eight years, with several other small children who were playing in that vicinity drew near, but, being called by their parents all withdrew except plaintiff. As the wagon stopped, Thomas went to the rear of the vehicle, and, taking up the tongs and a small tool known as a "chipper," laid hold of a piece of ice, and turned to deposit it on the ground or to carry it into the house. As

he swung around, the ice chipper in his hands struck the plaintiff in the eye, inflicting a wound from which it is alleged the child has suffered serious injury. For the damages thus sustained this action was instituted.

I. The original petition was drawn, and the case seems to have been tried by the plaintiff, on the theory that the relation of master and servant existed between defendant and

1. NEW TRIAL:
amendment
after verdict.

Thomas, and that for the negligence of the latter in such service the former may be held liable. After the evidence had been introduced and a verdict for defendant had been returned, at the direction of the court, plaintiff filed a motion for new trial, in connection with which he tendered an amendment to his petition, alleging that Wagner was addicted to the excessive use of intoxicants and not a proper or competent person to be intrusted with the delivery of ice by the defendant, and that he was guilty of negligence in permitting Thomas, who also was intoxicated at the time, to assist in said work, and that the injury of the plaintiff was the proximate result of Wagner's said negligence. As plaintiff had chosen his ground, proceeded to trial, and submitted his case on the claim as stated in the original petition, we think he cannot be permitted to mend his hold after a verdict has been returned against him, and demand a new trial on another and materially different theory. There was, therefore, no error in refusing a new trial, unless we find there was evidence upon which the issue joined upon the original petition should have been submitted to the jury.

II. Upon that issue the case could well be disposed of on the ground that, even if Thomas were the agent or servant of the defendant, there is no showing of actionable neg-

2. MASTER AND
SERVANT: neg-
ligence of
servant.

ligence on his part. There is nothing in the record to show that he knew or should have known of the presence of the boy in a place of danger. His action in taking the ice from the wagon and turning around with it was neither unnatural nor manifestly improper, con-

sidering the service he undertook to perform. The holding of the chipper in his hand was not in itself negligence, unless he knew or ought to have known that the child was exposed to injury therefrom; and of this, as we have said, there is no proof. Hence, however unfortunate or regrettable the accident to the young plaintiff, there would seem to be an entire absence of testimony upon which to base a recovery of damages.

This view renders it unnecessary for us to go into a discussion of the interesting question argued by counsel concerning the liability of the master for the negligence of one who volunteers to assist the servant, or to do the work which has been intrusted to the servant. That there are circumstances under which such liability exists is well established. *Aga v. Harbach*, 127 Iowa, 147; *Booth v. Wistar*, 7 C. & P. 446; *Haluptzok v. Railroad Co.*, 55 Minn. 446 (57 N. W. 144, 26 L. R. A. 739); *Althorff v. Wolfe*, 22 N. Y. 355; *Rummell v. Dilworth*, 111 Pa. 343 (2 Atl. 355, 363); *Sloan v. Railroad Co.*, 62 Iowa, 728; *Gleason v. Ansdell*, 9 Daly (N. Y.), 393; *Flick v. Railroad Co.*, 68 Wis. 469 (32 N. W. 527, 60 Am. Rep. 878); *Lakin v. Railroad Co.*, 15 Or. 220 (15 Pac. 641); *Carson v. Leathers*, 57 Miss. 650; *Railroad Co. v. Cusick*, 60 Kan. 590 (57 Pac. 519); *Englehart v. Farrant*, 1 Q. B. 240; *Bank v. W. U. Tel. Co.*, 52 Cal. 280; *Simons v. Monier*, 29 Barb. (N. Y.), 419; *Shearman & Redfield's Neg.*, section 157; *Barstow v. Railroad Co.*, 143 Mass. 535 (10 N. E. 255); *Keep v. Walsh*, 44 N. Y. Supp. 944 (17 App. Div. 104); *Dimmitt v. R. R. Co.*, 40 Mo. App. 654; *Coal Co. v. Hayes*, 12 South. 98 (97 Ala. 201). But, generally speaking, we think the rule of these authorities is not grounded upon the thought that one who assists a servant becomes thereby a servant of such servant's master, except it be in cases where we may find express or implied authority in the servant to employ or permit the assistance so rendered. In the absence of such authority, the one safe and logical ground

upon which to rest the liability of a master for the negligence of a volunteer assistant of his servant is the negligence of the servant in inviting or permitting a stranger to perform or assist in the performance of the work which was intrusted to his own hand. Where such negligence is shown with injury proximately resulting therefrom to a third person, who is himself without fault, the master is liable under the familiar rule which imputes to him the negligence of the employé in the course of his employment. See *Englehart v. Farrant*, 1 Q. B. 240; *Railroad Co. v. Cusick* 60 Kan. 590 (57 Pac. 519), and an article by Prof. Mechem in 3 Mich. Law Review, 198.

In the case before us there is no showing upon which an implication of authority in Wagner to employ or authorize the assistance of Thomas in his work can be found. Hence the latter was not the servant of the defendant. It follows, therefore, as we have already stated, that a claim against defendant for damages occasioned by the negligence of Thomas cannot be sustained.

The conclusions above announced dispose of all material questions suggested in the arguments of counsel.

The judgment of the district court is *affirmed*.

APPENDIX.

THEO. COFFEY, ET AL., Appellees, v. JAMES D. GAMBLE,
Judge, Appellant.

Taxation of costs: CERTIORARI PROCEEDINGS. The rules for the taxation of costs on error and appeal apply to certiorari proceedings.

Same. Ordinarily the costs on appeal will be taxed to the unsuccessful party, but this is largely discretionary with the court, and the rule will not be followed where injustice will result.

Same. Although the plaintiff in certiorari brought to review a contempt proceeding is held to have been illegally adjudged guilty of contempt for violating an injunction, yet if his act which it was sought to restrain was in fact wrongful he should be taxed with the costs of the certiorari proceeding.

SATURDAY, MAY 16, 1903.*

MOTION to tax costs in certiorari case.

Frank B. Wilson and *J. G. Culver*, for Appellees.

Hager & Haddock and *H. J. Chapman*, for Appellant.

LADD, J.—After the opinion in *Coffey v. Gamble*, Judge, 117 Iowa, 545, had been filed, the plaintiff therein moved that the costs be taxed to W. G. Burget, at whose instance the contempt proceedings against them were begun. To this the defendant objected and moved that the costs be taxed against Adair County. Notice was served on Burget but not on the County. Neither was a party to the pro-

* Publication of this case in its chronological order was overlooked.— Editor.

ceeding by certiorari, though Burget had filed the affidavit accusing the plaintiffs of contempt of court in disobeying the writ of injunction, employed counsel to prosecute them, and to defend in the above cause in this court. At least plaintiff's assertion to this effect is not put in issue.

Our statute provides generally that "costs shall be recovered by the successful against the losing party." Section 3853. This being so we need not revert to the rule prevailing at the common law further than to observe that the denial of costs was not peculiar to this proceeding. Costs *eo nomine* were not taxed in any action. If the complainant failed he was amerced *pro falso clamore*. If he succeeded the defendant was not held for costs. But while not allowed as costs in name, they were assessed as part of the damages — at first by the jury, but later by the court *ex gratia*. The early statutes received an exceedingly liberal construction, through which costs were taxed in actions apparently not contemplated. See *Allen v. Shurtz*, 17 N. J. Law, 188. In that case writs of *certiorari* were said to be in the nature of writs of error, and in analogy thereto, costs were assessed against plaintiffs as the proceeding questioned was approved. But in *Stiers v. Stiers' Executors*, 20 N. J. Law, 52, an order in probate was annuled and, pursuing the analogy, the plaintiff was not allowed costs, for if a writ of error be sustained it was thought to be unjust to subject the defendant, who was the successful party in the court below, to pay costs for the errors of that court. This is no longer regarded as a good reason for relieving the defeated party from the payment of costs, still it is held that a board or officer, not interested in the controversy, who merely acts in a judicial capacity will not be mulcted in costs, unless affirmatively shown to have acted in bad faith. *People v. Twp. Board of Springwell*, 12 Mich. 434; *School Directors v. School Directors*, 135 Ill. 464 (28 N. E. 49); *Oshkosh v. State*, 59 Wis. 425 (18 N. W. 324); *Tiedt v. Carstensen*, 64 Iowa, 131. In the last case it had been held that the board of super-

visors had exceeded its authority in establishing a highway and costs were first taxed against the board. A motion to retax was sustained and the costs assessed against the petitioners. The court in approving taxation against the real parties in interest said: "They bore the relation of plaintiffs to the proceeding to establish the road. They procured the erroneous order to be made, and should be responsible for the costs. It is said they are not parties to the record in the certiorari proceeding. It is true that, in all certiorari proceedings, the cause is nominally against the board, officer or judge, whom it is alleged has exceeded lawful jurisdiction. But it would be an unheard of proceeding to tax costs in such cases against the officer, where the excess of jurisdiction arises from a mere honest mistake of judgment. The costs in all such cases should be taxed against the party who is responsible for the illegal act by procuring it to be done." To the same effect, see *State v. Probate Court of Rock County*, 67 Minn. 51 (69 N. W. 908); *Oshkosh v. State*, *supra*; *Contra Kirby v. Circuit Court of McCook Co.*, 10 S. D. 196 (72 N. W. 461). Ordinarily then the costs are to be taxed against the person procuring the order adjudged illegal to be entered. If not a party to the action he may be brought in for this purpose by proper notice.

But defendant argues that the prosecution for contempt was criminal in nature and that the costs should be taxed against the county. See *Fisher v. Cass County Dist. Court*, 75 Iowa, 232; *Geyer v. Douglas*, 85 Iowa, 93; *State v. Stewettson*, 104 Iowa, 50. Jurisdiction to hear such cases is conferred by section 4468 of the Code, "No appeal lies from an order to punish for contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari." The analogy between this proceeding and the hearing on error and appeal heretofore mentioned, is all but complete, and we may well apply the rules for the taxation of costs in the latter thereto. In the one the evidence, where the action of the court is founded on that of others, is filed

and preserved as a part of the record at the time of the judgment, section 4468 Code; in the other, by bill of exceptions. In each the record is reviewed. Why this is not permitted in a direct proceeding by appeal, instead of by certiorari proceedings, need not be considered. It is enough that the result is practically the same, and we think the same rules in the matter of taxation of costs applicable. Section 4142 of the Code directs the Supreme Court to "provide by rule for taxing as costs all printing authorized upon the trial of appeals"; and also "the costs of any translation of short hand notes." Rule 97 of this court reads: "All taxable costs shall abide the result of the appeal and be taxed to the unsuccessful party, unless otherwise ordered." The court, upon an affirmance of the order assailed, will ordinarily tax the costs to plaintiff; and upon reversal to the party who procured it to be entered. But this should not always be done, for it may appear, as in the instant case, that this would be inequitable. The matter is discretionary under the rule quoted. True, the plaintiffs were improperly convicted of contempt in the violation of the writ of injunction as was held in *Coffey v. Gamble, supra*. It is equally true that the writ of injunction had been improvidently dissolved, and that the plaintiffs were wrong-doers in committing the acts complained of in the contempt proceedings. *Burget v. Incorporated Town of Greenfield*, 117 Iowa, 545. Had not Burget interposed in some way to prevent the destruction of trees in front of his home by plaintiffs, the loss would have been irreparable. That he chose the wrong, though, as appears a very effective remedy, ought not in the circumstances disclosed to subject him to the payment of plaintiffs' costs. In any event, they were acting in violation of law and we are not inclined to relieve them of any of the costs incident to the adjustment of their legal rights in the certiorari proceeding. As to the liability of the county, we express no opinion, as it was not notified of the pendency of defendant's motion. It follows that the plaintiff's motion to tax the costs to Burget must be and is — *overruled*.

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ABSTRACT OF TITLE.

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Same: Good title. Good title means an estate in fee simple, a marketable title, one that can be resold or mortgaged to another, who exercises reasonable prudence with respect thereto. *Idem*.

Same. A contract to convey good title has reference to the record title which may be epitomized in an abstract, and when it is further agreed to furnish an abstract showing such title, as a condition precedent, one cannot be required to rely upon any other evidence thereof than such as is contained in the abstract itself. *Idem*.

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Same: Amendment: New cause of action. A real estate agent who has prosecuted his action for commission to a final determination on appeal, basing his claim on a breach of his agency contract through a sale by the owner, cannot, upon reversal and retrial, amend his petition and claim his commis-

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Same: Liability of administrator. A creditor of heirs whose garnishment of an administrator is subsequent to a valid assignment by the heirs of their interest in the estate, acquires no right to the funds. *Idem.*

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BANKS AND BANKING Continued TO CHANGE OF VENUE

Double liability of stockholders: Enforcement: Parties. An assessment in a receivership proceeding is the proper method for enforcing the double liability of a stockholder of an insolvent bank, but under the present statute to bind a stockholder by the assessment he must have been brought into the action, individually, prior to the assessment. *Elson v. Wright*, 634.

Same: Expiration of charter: Effect. The expiration of a bank charter does not operate to render stockholders thereafter liable for indebtedness simply as partners, but double liability under the statute continues, so far at least as the valid indebtedness created while the corporation had a legal existence is concerned. *Idem*.

Insolvency: Claims: Preference. An insolvent banker who sells a draft, knowing that his correspondent has no funds with which to pay the same, obtains money therefor wrongfully and holds it in trust for the purchaser; and a claim therefor against his estate is entitled to preference. *Whitcomb v. Carpenter*, 227.

Same. Moneys received by an insolvent bank to be applied to a particular debt, or to be remitted to a creditor of the person paying the same, are regarded as trust funds and ordinarily entitled to preference over claims of general creditors in the distribution of the assets of the insolvent bank; and this right cannot be defeated by a showing that the assets of the bank in the hands of an assignee for the benefit of creditors is less than when the money was received by it. *Idem*.

BILLS AND NOTES. See NEGOTIABLE INSTRUMENTS — CORPORATIONS.

BOUNDARIES. See REAL PROPERTY.

BREACH OF PROMISE. See CONTRACTS.

CARRIERS — CARRIERS OF PASSENGERS. See RAILROADS.

Baggage: Liability for loss. A baggage agent has implied authority to receive for transportation as baggage, articles not ordinarily regarded as such, and in doing so the carrier is bound by his acts, unless the passenger is advised that the agent has exceeded his authority. *Bergstrom v. Railway Co.*, 223.

CERTIORARI. See COSTS.

CHALLENGES. See JURORS.

CHANGE OF VENUE. See PRACTICE — CRIMINAL LAW.

CHATTEL MORTGAGES

TO

CONVEYANCES

CHATTEL MORTGAGES.

Foreclosure: Application of proceeds. A mortgagee of personal property should apply the proceeds arising from a sale on foreclosure to the satisfaction of the mortgage debt, and not to the extinguishment of a landlord's claim for rent which he may hold by assignment. *Savings Bank v. Wood*, 232.

Same. A tenant cannot insist that the proceeds arising from a sale of nonexempt property under the foreclosure of his chattel mortgage, shall be applied to the satisfaction of a landlord's claim for rent covering exempt property, which is also held by the mortgagees, so as to clear the exempt property from that liability for the benefit of the tenant. *Idem*.

CITIES AND TOWNS. See MUNICIPAL CORPORATIONS.

COMMISSION FOR THE SALE OF LAND. See AGENCY.

COMPROMISE AND SETTLEMENT. See INSURANCE.

CONDEMNATION. See INJUNCTIONS.

CONSPIRACY. See CRIMINAL LAW.

CONTRACTS. See also HUSBAND AND WIFE — MUNICIPAL CORPORATIONS — REAL PROPERTY — SALES.

Breach of promise: Discharge in bankruptcy. An action for breach of a marriage promise, in which there are no allegations of seduction or other wrong, is for a simple breach of contract and is not within the exception of the bankruptcy act providing that the discharge shall not release the bankrupt from liability on a judgment "for wilful and malicious injury to the person or property of another." *Bond v. Milliken*, 447.

Proof of performance. When no time is fixed by the parties within which a contract is to be performed it is necessary, in suing thereon, to prove performance within a reasonable time. *Harris v. Moore*, 704.

Rescission. A contract may be rescinded for breach of warranty even though severable, if the breach goes to the entire consideration. *Telephone Supply Co. v. Telephone Co.*, 252.

CONVERSION. See CORPORATIONS — ESTATES OF DECEDENTS.

CONVEYANCES.

Deeds: Consideration: Parol evidence of. The real consideration for a deed from a husband to his wife may be shown by parol, where creditors of the husband are seeking to set the

CONVEYANCES Continued

TO

CORPORATIONS

same aside as fraudulent. *Engine & Thresher Co. v. Greenlee*, 368.

Consideration: Parol evidence. It is permissible to show by parol that a deed of property was made by decedent in consideration for a claim for services which plaintiff is seeking to establish against the estate. *Dean v. Carpenter*, 275.

Delivery: Evidence. The possession and recording of a deed during the life of the grantor and unequivocal assertions of title thereunder will establish delivery of the instrument so as to pass title, as against random statements of the grantee that he claimed only a life interest in the property, made to those having no interest therein and to whom he was under no obligation to disclose his title. *McCarthy v. Colton*, 658.

CORPORATIONS.

Incorporation. A notice of incorporation printed in a newspaper published in a small town remote from the corporation's principal place of business, when there are several other papers of more general circulation published in larger and more accessible towns, is not a compliance with the statute requiring such notice to be printed in a newspaper as convenient as practicable to the principal place of business, and will not effect incorporation. *Iron Works v. Neiting*, 311.

Same: Individual liability of stockholder. The individual property of one who acquires an interest in a corporation within the three months allowed for publication of the notice of incorporation, is subject to the claims of creditors thereof arising after he became a member, where there was a failure to publish legal notice and no showing that such stockholder did not know all the facts connected with the organization at the time he became a member, or when the indebtedness was incurred. *Idem*.

Corporate stock: Conversion. The assignee of corporate stock may elect to treat the wrongful refusal of the corporation to register the transfer as a conversion thereof, and may recover the full value. *Dooley v. Mines & Milling Co.*, 468.

Same: Extent of recovery. Where refusal to register a transfer of corporate stock amounts to conversion, the assignee may recover the full value at the time of demand with interest to the date of trial. *Idem*.

Market value. The market value of stock, in a suit for conversion, is the price it was selling for on the market at the time of conversion. *Idem*.

Transfer of stock: Demand: Conversion. Where the secretary

CORPORATIONS Continued

TO

COSTS

of a corporation refused to register a transfer of corporate stock when properly presented for that purpose, but referred the assignee thereof to the general manager, who also refused, the demand and refusal amounted to conversion, even though the manager was not at the time in his place of business, to which fact no objection was made. *Idem*.

Same: Tender. After conversion of corporate stock by refusal to register a transfer, a tender of performance during the trial is not a defense to an action for the price. *Idem*.

Corporate debts: Liability of stockholders: Action against. Failure to publish notice of incorporation renders the stockholders liable for corporate debts, and it is no objection to a suit against them as such that they are designated in the petition as co-partners. *Houts v. Brass Works*, 484.

Same. The question of whether one who buys stock in a defectively organized corporation is liable for the debts of the corporation contracted prior to his purchase, has not been determined in this State, and owing to the state of the record is not determined in this action. *Idem*.

Notes: Execution. The renewal note of a corporation is not rendered invalid because executed by an officer who has been superseded, where the signature of such official is not essential thereto. *Houts v. Brass Works*, 484.

Agricultural societies: Power to conduct games. A fair Association organized as a County Agricultural Society has power to conduct ball games and such other lawful sports as its directors may determine upon. *Williams v. Dean*, 216.

Same: Personal injury: Liability of directors. The directors of an Agricultural Society are not personally liable to a patron of a ball game conducted by the society, who is injured by a wild ball, upon a mere showing of insufficient screens to protect spectators. There must be proof of misfeasance on the part of the directors and then only those who participated in the wrongful act are liable. *Idem*.

COSTS.

Apportionment of costs. Where the main issue in a cause concerning which the principal costs are incurred is determined in favor of one party and a minor claim is either undisputed or admitted in favor of the other, but is not allowed by the jury, an offer to permit judgment for the minor item to avoid a new trial, with costs incident thereto, authorizes an equitable apportionment of the costs rather than a taxation of the entire amount to either party. *Krause v. Redman*, 629.

Costs Continued

TO

CRIMINAL LAW

Taxation of costs: Certiorari proceedings. The rules for the taxation of costs on error and appeal apply to certiorari proceedings. *Coffey v. Gamble*, 754.

Same. Ordinarily the costs on appeal will be taxed to the unsuccessful party, but this is largely discretionary with the court, and the rule will not be followed where injustice will result. *Idem*.

Same. Although the plaintiff in certiorari brought to review a contempt proceeding is held to have been illegally adjudged guilty of contempt for violating an injunction, yet if his act which it was sought to restrain was in fact wrongful he should be taxed with the costs of the certiorari proceeding. *Idem*.

Same. The Supreme Court will not remit attorney's fees excessively taxed to which the attention of the trial court was not called. *Finn v. Seegmiller*, 15.

Same. A plaintiff should not be taxed with defendant's costs after an offer to confess judgment which is refused, unless his recovery is less than the amount of the offer. *Castner v. Railway Co.*, 648.

Injunctions. The costs in an action to enjoin the enforcement of an illegal decree abating a nuisance are properly taxable to the party who was active in procuring the decree to abate the nuisance. *Beck v. Vaughn*, 331.

Will contests. The cost of a will contest, where the proponent is claiming the estate under the will and contestants as heirs at law and next of kin, should be taxed to the unsuccessful party under the general rule. *In re Estate of Hendershott*, 320.

COUNTIES. See MUNICIPAL CORPORATIONS.

COURTS.

Judges: Disqualification: Interest in suit. A judge is not disqualified from hearing and deciding a motion to dissolve an injunction restraining a city from condemning land to protect its water supply, because he is a taxpayer of the city and indirectly interested in its supply of water. *Laplant v. City of Marshaltown*, 261.

CREDITOR'S BILL. See ACTIONS.

CRIMINAL LAW. SEE ALSO OFFICERS.

Appointment of counsel for accused: Compensation for second trial. An attorney appointed by the court to defend one charged with a crime need not be again appointed, after a re-

CRIMINAL LAW Continued

versal of the case on appeal, to entitle him to pay from the county for defending the prisoner on the second trial. *Tomlinson v. Monroe County*, 608.

Same: Amount of compensation. Counsel appointed to defend one charged with a homicide punishable by life imprisonment is entitled to the same fee on a retrial as on the first trial of the case, although the first trial amounted to an acquittal of all degrees of the crime, except manslaughter, which is not punishable by life imprisonment. *Idem*.

Arrest without warrant: Evidence. An officer has no authority to make an arrest for drunkenness without a warrant, unless at the time of arrest the person shall be found in a state of intoxication. The evidence in the instant case regarding intoxication was in such conflict as to require submission of the issue. *Snyder v. Thompson*, 725.

Same: Justification: Burden of proof. Except as provided by statute an officer cannot rightfully make an arrest without a warrant; and when he assumes to act without a warrant he has the burden of proof on the question of justification, in a suit for false imprisonment. *Idem*.

Change of venue: Discretion. The court's discretion in refusing to grant a change of venue on the ground of excitement and prejudice, growing out of a former trial on the same indictment, will not be interfered with on appeal, when the same is both controverted as well as supported by the usual affidavits on the subject. *State v. Hoffman*, 587.

Infants: Exposure: Who liable. One to whom an infant is confided by its parent for the purpose of exposure is within the contemplation of Code, section 4766, making it a crime to expose a child under six years of age with intent to abandon it; and the question of whether the child was so confided is one of fact for the jury. *State v. Sparegrove*, 599.

Intoxication as defense to crime: Burden of proof. A defendant cannot be convicted of a crime when at the time of its commission he was so under the influence of liquor as to be incapable of forming a criminal intent, but he has the burden of establishing such intoxication. *Idem*.

Conspiracy: Proof. The fact of conspiracy need not be proven by direct evidence, but proof of concert of action in carrying out a criminal purpose will support conviction. *State v. Caine*, 147.

Same: Acts of co-conspirators. After a *prima facie* case of conspiracy has been made out, the acts of numerous persons engaged in carrying out the purpose of the conspiracy may be

CRIMINAL LAW Continued

shown, though not committed in the presence of defendant. *Idem.*

Embezzlement by official: Proof essential. In a prosecution of a public officer for embezzlement of funds coming into his hands by virtue of his office, the State need not affirmatively show failure to account therefore on demand, where it has clearly established a conversion of the funds. *State v. Hoffman*, 587.

Same: Indictment. Code, section 4840, defines two forms of embezzlement by public officers, the first of public money or property, and the second of money or property coming into the hands of such officer by virtue of his office; and an indictment charging the latter need not allege a failure of defendant to account for the money coming into his hands. *Idem.*

Rape: Corroboration: When immaterial. A conviction for simple assault operates as an acquittal of a charge for assault with intent to rape, and alleged erroneous rulings and instructions regarding corroborating evidence are eliminated, as no corroborating evidence in case of assault is required. *State v. Hoover*, 17.

Same: Statements of prosecutrix. On a prosecution for rape the complaining witness may state that at another time and place she recognized defendant as her assailant, but in the absence of words or conduct on his part tending to point him out as the guilty party she should not be permitted to give the conversation, unless the same occurred at the time and place of the alleged crime, or so closely connected therewith as to be a part of the *res gesta*. *Idem.*

Seduction: Dismissal of prosecution. A defendant in a prosecution for seduction is not entitled to a dismissal under Code, section 5536, because the trial has been postponed over the second term at which it was triable, where by agreement it was continued until a civil action for damages involving the same facts had been disposed of, the civil action being on trial at the time the motion to dismiss was ruled upon. *State v. Nugent*, 237.

Same: Offer of settlement. One charged with seduction may lawfully attempt a settlement of the civil claim for damages and the act cannot be construed in the criminal prosecution as a confession of guilt; and a reference, in the cross-examination of prosecutrix, to the civil action and also to a conversation with defendant's attorney in the presence of defendant with reference to the date of the seduction, did not authorize her examination on redirect as to a proposition of settlement and offer of money to dismiss the civil action. *Idem.*

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CRIMINAL LAW Continued

Same: Evidence of intercourse. On a prosecution for seduction evidence of the birth of a child is admissible, at least in support of the claim of intercourse and the date thereof. *Idem.*

Same: Election between acts. Although a prosecutrix testifies to several acts of intercourse yet she cannot be compelled to elect on which she will rely, in a prosecution for seduction, since the seduction occurred at the time of the first act, and the subsequent acts were material as bearing on the relation of the parties and to corroborate the prosecutrix respecting the initial act. *Idem.*

Evidence: Impeachment by use of grand jury minutes. The State may use the minutes of the testimony of a defendant taken before the grand jury, and read over to and signed by him, for the purpose of impeaching his testimony as a witness upon the trial, when the proper foundation has been laid. *State v. Hoffman*, 587.

Same. Proof of general good reputation for truth and veracity is not admissible in support of the testimony of a witness impeached by proof of conflicting statements. *Idem.*

Indictment: Duplicity. Where the separate counts of an indictment for conspiracy charge but one confederation it is not bad for duplicity, and the State will not be required to elect on which count it will rely prior to the introduction of its evidence, even though different objects or purposes are stated. *State v. Caine*, 147.

Same: Motion to re-submit: Resistance: Estoppel. A defendant, who, before trial successfully resists a motion by the State to set aside the indictment and re-submit the cause to the grand jury, because of alleged defects therein, cannot upon conviction rely on a denial of the motion as ground for reversal. *State v. Hanlin*, 493.

Instructions: Alibi. An instruction that "if the entire evidence, including the *defense* of alibi, upon the whole case raises a reasonable doubt as to the defendant's guilt then you should acquit him" is held to have been without prejudice, although the court inadvertently used the word "defense" where the word "evidence" was intended. *State v. Nugent*, 237.

Same: Uncontroverted facts: Prejudice. Where the jury is told that defendant is indicted for exposing a child under six years of age and is given the substance of the statute, prejudice cannot be predicated on a failure to specifically call attention to the age of the child, especially where no question as to its age was raised upon the trial. *State v. Sparegrove*, 599.

DAMAGES

TO

DRAINAGE

DAMAGES. See INTOXICATING LIQUORS — REAL PROPERTY — TRESPASS.

Loss of services: Value: Evidence. In an action by the husband for loss of his wife's services, a witness, who, as the head of a family, has for several years been in a similar station in life with that occupied by plaintiff, may testify to the value of services similar to those rendered plaintiff by his wife, basing his judgment on his experience and observation, even though such damages may not be the subject of expert testimony. *Croft v. Railway Co.*, 411.

Personal injury: Excessive damages. A verdict for \$8,500 for injuries received by plaintiff, fifty years of age and earning \$9 per week, which resulted in a permanently crippled condition and pain and greatly reduced earning capacity is held not excessive. *Foster v. Railway Co.*, 67.

DEPOSITIONS. See EVIDENCE.

DOWER. See HUSBAND AND WIFE.

DRAINAGE.

Establishment of drainage system: Review. Primarily the utility of establishing a drainage system is for the board of supervisors to determine, and the court will not interfere with its finding unless the evidence is very clear that it is not a work of public utility, or the benefits are not commensurate with the cost; and the burden of making such a showing is upon the party attacking the order. *Temple v. Hamilton Co.*, 706.

Dismissal of proceeding. Appearance of a county attorney, in a proceeding to establish a drainage district pending on appeal in the district court, and the entry by him of a disclaimer by the county of any interest in the proceeding, does not amount to a dismissal of the proceeding and preclude further action therein by the real parties in interest. *Idem.*

Same: Authority of supervisors. After the preliminary steps for the establishment of a drainage district have been taken and the matter is pending on appeal in the district court, the board of supervisors has no power to dismiss the proceedings and thus nullify the order of establishment, unless it shall first find some fatal defect in the proceeding, or that it is not a work of public utility, or that the benefits are not commensurate with the cost. *Idem.*

Same: Intervention by petitioner. On appeal from an order establishing a drainage district and the construction of drains

therein, a petitioner whose lands are affected and who has given the bond for costs, may intervene and defend the order. *Idem.*

License to drain: Revocation. One who constructs tile drains for his own exclusive benefit, which connect with and discharge the water into the drain of an adjoining owner on his land, under an agreement that the same may be maintained so long as satisfactory to the adjoining owner, cannot enjoin an interference with the continued maintenance and use thereof. *Thompson v. Normanden*, 720.

Same: Estoppel. Estoppel cannot be predicated on a mere permission to use the land of another for drainage purposes. *Idem.*

EASEMENTS. See REAL PROPERTY.

ELECTION OF REMEDIES. See ACTIONS.

EMBEZZLEMENT. See CRIMINAL LAW.

EMINENT DOMAIN. See INJUNCTIONS — REAL PROPERTY.

EQUITY.

Laches. A mere speculator in titles who procures his deeds without consideration and with knowledge that his grantors make no claim to the land conveyed, but have for years recognized the title of another, is bound by their laches and acquires no interest in the property as against good faith purchasers of an adverse title who had no knowledge or notice of any claim of his grantors. *Warner v. Hamill*, 279.

Where abandonment of title and ownership are shown, in a partition proceeding, with equitable circumstances in favor of defendant from which laches may be imputed to plaintiff, the burden of proof rests upon plaintiff to excuse the laches. *Idem.*

Where a vendee of land has knowledge of such facts, respecting the abandonment by his grantors of any claim to the land conveyed, as would put a man of ordinary prudence on inquiry he is chargeable with such knowledge as he might thus have gained; and in such cases matters of public record are constructive notice. *Idem.*

Where laches has run against an ancestor it continues against a minor heir the same as the statute of limitations. *Idem.*

Specific performance: Compensation in damages. Specific performance of a contract will not lie where compensation in damages will afford adequate relief. *Robinson v. Luther*, 463.

EQUITY Continued

TO

ESTOPPEL

Same: Discretion: Consideration. Specific performance rests largely in the discretion of the court and will not be decreed except upon an application based on a valuable consideration. *Idem.*

ESTATES OF DECEDENTS.

Administration of estate of absentee. While as a general rule a probate court has no jurisdiction to administer the estate of a person still living, yet it may be provided as in Code, section 3307, that where a person has absented himself from the State and concealed his whereabouts from his family for a series of years his property may be administered upon in the same form of proceeding as that of a deceased person; and the administration will be valid against the absentee and all persons interested, although he is in fact still living. *Insurance Co. v. Chittenden*, 613.

Claims: Proof. One who pleads an express written agreement as the basis of a claim against an estate cannot recover upon proof of an oral agreement. *Leonard v. Leonard*, 131.

Conversion. Where a testator after devising real estate makes a contract for the sale thereof which is enforceable against him, the conversion from realty into personalty may be completed after his death by payment of the purchase price, even though the contract is executory in character; and the proceeds will be distributed as personalty. *In re Estate of Brenhard*, 603.

Sale of real estate: Interested parties: Notice: Collateral attack. The creditor of an heir holding an attachment lien upon his interest in real estate belonging to the estate is an interested party, and entitled to notice of an application by the administrator for an order to sell the real estate to pay debts; and if an order of sale is made without notice to him his lien is not displaced, and he may attack the proceeding in a collateral action to enforce his lien against the land in the hands of the purchaser. *Mullin v. White*, 681.

Settlement of controversies. Conceding to an executor power to settle a controversy respecting estate property without an order of court, still he cannot delegate such power and through another effect a settlement binding upon the estate; nor can one of several heirs effect a settlement which will be binding upon the others. *Williamson v. Robinson*, 345.

ESTOPPEL. See DRAINAGE — JUDGMENTS — PARTITION.

One who accepts the benefits of a contract made in his behalf by another cannot deny the authority of the person making it. *Dean v. Carpenter*, 275.

ESTOPPEL Continued**TO****EVIDENCE**

An equitable estoppel bottomed upon silence does not arise unless there is a duty to speak and by failure to speak the other party, ignorant of the truth, is misled into doing something he would not have done but for such silence. *Wingert v. City of Tipton*, 97.

Estoppel in pais: Failure to assert title. A child to whom a father has conveyed property prior to his second marriage is not estopped to assert his ownership, on the ground that it was in fraud of marital rights, by failing to assert his ownership when called upon subsequently to the marriage to take an acknowledgment of the father conveying other property to another child, where there was no occasion for him to speak. *Beechley v. Beechley*, 75.

WEAVER and LADD, JJ., dissenting.

EVIDENCE. In CRIMINAL CASES, see CRIMINAL LAW.

Admission of evidence: Prejudice. Prejudice will not be presumed from the admission of incompetent evidence which is stricken on motion, though without comment by the court, when there is other competent evidence on the subject which is not denied. If comment of the court upon the ruling is necessary counsel should request it. *Croft v. Railway Co.*, 411.

Same. Where evidence as to the distance within which a street car can be stopped is stricken, because based upon a supposed use of different appliances than those in use on the car in question and the jury is directed to give it no consideration, and subsequently the witness changes his evidence on the subject to correspond with that of a prior witness, it will be presumed that the jury followed the court's direction to disregard the stricken testimony, in the absence of a showing of prejudice. *McBride v. Railway Co.*, 398.

Same. On the trial of a law action to the court, it will be presumed that any error in admitting incompetent evidence is cured by a withdrawal of the same. *Arment v. Arment*, 199.

Same. Refusal to permit evidence which is a mere conclusion of the witness with reference to facts to which he has already testified is not erroneous. *Gardner v. Separator Co.*, 6.

Same. In an action for the price of telephones a letter of recommendation from another purchaser to the effect that the instruments were satisfactory was admissible on the question of whether plaintiff relied upon an alleged warranty; but its exclusion was not erroneous where the agent negotiating the sale was afterward permitted to testify that he exhibited the

EVIDENCE Continued

- letter at that time. *Telephone Supply Co. v. Telephone Co.*, 252.
- Same: Instruction.** The erroneous admission of evidence can often be counteracted by an instruction to the jury not to consider it, but a presentation of the same in argument may render it so prejudicial that the error cannot be cured by the instruction. *Brown Land Co. v. Lehman*, 712.
- Examination of witness.** Where a druggist has testified concerning a book formula for compounding a solution it is proper to cross-examine him with respect thereto, but this does not authorize placing the contents of the book before the jury on his redirect examination. *Ball v. Skinner*, 298.
- Same.** The cross-examination of a witness is so largely a matter of discretion that its flagrant abuse must be shown to justify interference. *Telephone Supply Co. v. Telephone Co.*, 252.
- Conclusion of witness.** A witness should not be permitted to state his own opinion as to a material proposition of mixed law and fact, but should state the facts and leave the conclusion to be drawn therefrom to the court and jury. *Wilson v. Coal Co.*, 594.
- Same.** Where nothing is involved in the answer of a witness but his own volition it is a conclusion; but, if improperly excluded on that ground no prejudice arises where the matter is afterwards fully gone into with the same and other witnesses. *Wilder v. Cereal Co.*, 451.
- Same.** Although evidence is erroneously rejected as a conclusion, prejudice will not result where the witness is subsequently permitted to detail the facts upon which the supposed conclusion is based. *Mikesell v. Railway Co.*, 736.
- Objection to evidence.** A party cannot wait until a witness has answered and then object if the evidence is not satisfactory; his remedy after the answer is by motion to strike. *Savings Bank v. Cook*, 185.
- Depositions: Objections: Review.** A general objection to the offer of a deposition, that the necessary foundation for its introduction has not been laid, is insufficient to support the specific objection on appeal, that the certificate of the notary and endorsement of the clerk were not offered upon the trial; counsel should have pointed out this objection to the court below. *Krause v. Redman*, 629.
- Demonstrative evidence: Discretion.** Permission of tests or demonstrative evidence in the presence of the jury is largely discretionary and the action of the trial court in the matter

EVIDENCE Continued

will rarely be interfered with. *Telephone Supply Co. v. Telephone So.*, 252.

Expert evidence: Instructions. As a general rule expert testimony should be given consideration like all other testimony, which the court permits to go to the jury, and should be accorded such weight as, in view of all the evidence of every kind and nature and its reasonableness and the apparent candor and competency of the witness, in fairness it demands. *Ball v. Skinner*, 298.

Same. An instruction which permits the jury to pass upon the materiality of a false assumption of facts embraced in a hypothetical question addressed to an expert; to determine whether a false assumption of a material fact is of such a character as to destroy the value of an expert opinion based thereon; and permitting the jury to accord some weight to an opinion based upon an assumption wholly or partially incorrect, is erroneous. *Idem*.

Hearsay. Hearsay evidence is sometimes admissible for the purpose of fixing a date, but this exception to the general rule should be applied with caution because of the danger that the jury may give effect to the same as substantive proof of the fact embodied in the hearsay statement. In the instant case the evidence is held to have been prejudicial. *State v. Hoover*, 17.

Life tables: Expectancy of female. Where a life table is introduced for the purpose of showing expectancy at certain ages, with no reference therein to sex, it is competent evidence on the expectancy of a female. *Croft v. Railway Co.*, 411.

Offer of proof: Reduction to writing. Error cannot be predicated on a neglect to require counsel to reduce to writing matters which he expects to prove by a witness, where no request was made therefor and the court was not asked to strike the oral statement thereof or to direct the jury to disregard it. *Telephone Supply Co. v. Telephone Co.*, 252.

Order of proof: Discretion: Harmless error. The order of introduction of evidence is largely discretionary, and although the court excluded a purported revocation of the will in contest when offered as a part of contestant's evidence in chief, but admitted it in rebuttal, the rights of proponents are held not to have been prejudiced thereby, especially as they did not ask leave to introduce further evidence. *In re Estate of Hendershott*, 320.

Parol evidence: Variance of writing. Parol evidence is not

EVIDENCE Continued TO EXECUTIONS

admissible to vary the terms of a written instrument. *Houts v. Brass Works*, 484.

Same. Where it was alleged in an action on a corporation note that the payee should turn the note in as payment on a contract of the corporation to furnish him certain articles, such agreement if proven will not destroy the enforceability of the note upon failure of the corporation to perform, but at the most will only form the basis of a claim for damages. *Idem*.

Remarks of court: Prejudice. Where a physician charged with negligence in using a certain solution prepared for him by a druggist sought to show that physicians rely generally on druggists for the purity, quality and proper compounding of their drugs and medicines, a remark of the court, in ruling the evidence out, that from his own observation and knowledge of the matter such was not the fact, was prejudicial; and the error was not cured by subsequently admitting the evidence with a reiteration of the same remark. *Ball v. Skinner*, 298.

Right of jury to exhibits. In an action to recover over-payments made to the State Binder on the theory that he had bound pamphlets with covers, and there was an issue as to what constitutes a cover, it was error to refuse an application to permit the jury to take the pamphlets received in evidence upon the trial with them to the jury room. *State v. Young*, 505.

Transactions with decedent: Competency of witness. A witness called on behalf of an administrator, in an action to establish a claim against the estate, is competent to testify to transactions leading up to the making of certain deeds by decedent. *Dean v. Carpenter*, 275.

Same: Declaration of decedent. Declarations in his own interest made by a decedent in the presence of one seeking to establish a claim against his estate are admissible. *Idem*.

EXECUTIONS.

Inadequacy of price. Where an effectual levy cannot be made on an undivided interest in a portion of a tract of land, the fact that the value of the entire interest is greatly in excess of the judgment, will not show such fraud as to render a sale thereof void. *Jonas v. Weires*, 47.

Vested estates: Sale on execution. The interest of one who takes a vested remainder under the terms of a will is subject to sale on execution before he comes into possession; and this rule is not affected by a provision in the will that when

EXECUTIONS Continued

TO

GARNISHMENT

the devisees come into enjoyment the indebtedness of any one of them to another shall be paid out of his share before the remainder is paid over to him. *Idem.*

FRAUD. See HUSBAND AND WIFE.

False representations: Proof. In an action for false representations it must not only appear that the representations were made and relied upon, but that they were known by defendant to be false. *Brown Bros. v. Korn & Lee*, 699.

Same. The general rule that a voluntary conveyance made in contemplation of marriage will be declared fraudulent does not apply to children by a former wife, where there were no false representations and only reasonable provision was made.

Evidence held insufficient to show false representations. *Beechley v. Beechley*, 75.

Fraudulent conveyances: Intent: Knowledge of grantee: Evidence. Where there is an adequate consideration for a conveyance from a father to his child by a deceased wife the conveyance is not voluntary and will not be set aside as fraudulent at the suit of a second wife, in the absence of knowledge by the grantee of intent to defeat plaintiff's marital rights; and a request of the grantor to withhold the conveyance from record, under circumstances which would cause the grantee no surprise, is not sufficient to charge him with knowledge. *Idem.*

Exchange of lands: Withdrawal of evidence. In an action for fraud in procuring title to land, pursuant to a contract for the exchange of properties, withdrawal of evidence as to defendant's representations of the value of his land and by which a deed placed in escrow was obtained, was erroneous. *Kempe v. Bennett & Binford*, 247.

Instructions. The plaintiff in an action for fraud based upon a general plan of acts and statements intended to deceive, is entitled to have his theory of the case submitted to the jury; and omission of all reference to liability upon proof of the general plan which the court outlined in stating the issues, at the same time instructing that proof of certain alleged acts and statements will not authorize recovery, is erroneous. *Idem.*

Voluntary conveyance: Proof. Where a voluntary conveyance operates as a fraud upon creditors it is not necessary to allege and prove fraud on the part of the grantee. *Richardson v. Richardson*, 242.

FRAUDULENT CONVEYANCES. See FRAUD.**GARNISHMENT.** See ATTACHMENT.

GUARDIANSHIP

TO

HUSBAND AND WIFE

GUARDIANSHIP. See ATTACHMENT.**Guardian and ward: Contract of guardian to pay attorney's fees.**

To give validity to the contract of the guardian of a minor to pay attorney's fees for matters pertaining to the minor's estate, the order of court authorizing the same must be made a matter of record. *In re Estate of Manning*, 165.

Same. The guardian of a minor heir is entitled, on the final report of the trustee of the minor's estate, to contest the validity of a contract with the trustee providing for payment of attorney's fees to the trustee. *Idem*.

Same: Settlement: Burden of proof: Evidence. A guardian who claims a settlement with his ward after he has become of age has the burden of proof on that issue. Evidence reviewed and held to sustain the burden. *In re Estate of Robb*, 195.

Insanity: Evidence. In a proceeding for the appointment of a guardian for a person of unsound mind, under Code, section 3219, the evidence is reviewed and it is held that defendant was not in such mental condition as to require a guardian to manage and control her property. *Arment v. Arment*, 199.

HOMESTEADS.

Forfeitures. Neither the fact that a mortgagor may have testified falsely in assisting the mortgagee to establish the lien of his mortgage as against an attaching creditor, nor failure of the mortgagor to demand that the mortgagee be first required to exhaust the non-exempt property, will operate as a forfeiture of homestead rights, or warrant a decree requiring that the homestead be first applied to the satisfaction of the mortgage; since a homestead once vested cannot be forfeited except through abandonment or relinquishment. *Savings Bank v. Glick*, 323.

Liability for debts. A creditor cannot subject the proceeds of a homestead, acquired before the debt was contracted, to the payment of his claim. *Green v. Forney*, 316.

HUSBAND AND WIFE.

Ante-nuptial agreement: Statute of frauds. The ante-nuptial oral agreement that neither of the parties nor their heirs shall have any interest in the property of the other as a result of their marriage is within the statute of frauds and cannot be proven, even though the same is reduced to writing after marriage, unless the writing recites that it is to furnish evidence or is in consideration of the prior oral agreement. *Frazer v. Andrews*, 621.

HUSBAND AND WIFE Continued

Conveyances before marriage: Fraud: Evidence. The general rule is that a voluntary conveyance made with intent to defraud the party who subsequently becomes the husband or the wife of the grantor is void, whether the future spouse was selected at the time of the conveyance or not. Overruling the case of *Gainor v. Gainor*, 26 Iowa, 337, which limits the rule to cases where the spouse was then selected.

In the instant case the evidence fails to show intent to defraud. *Beechley v. Beechley*, 75.

Same: Misrepresentations of grantor. Misrepresentation by a grantor, in an ante-nuptial conveyance, of the value of his property is not competent on the question of fraud in its execution, as against the subsequent husband or wife. *Idem*.

Fraudulent conveyances. Where a debtor has no property as a basis of credit other than certain lands standing of record in his name and with the knowledge of his wife he acquires credit on the strength thereof, an unrecorded conveyance to the wife, which is secretly held by her at the time the indebtedness arose, will be set aside at the suit of the creditor, except as to that part to which a homestead right has attached. *Savings Bank v. Glick*, 323.

Same. Although an oral contract of the husband to convey land to his wife could not have been enforced because of indefiniteness, yet if it has been carried out the creditors of the parties can not set the conveyance aside on the ground of vagueness in the original agreement. *Engine & Thresher Co. v. Greenlee*, 368.

Same: Assignment of inheritance. The contract of the husband to assign his prospective inheritance to his wife cannot be annulled by his creditors on the ground of fraud after the same has been performed in good faith and for a consideration. *Idem*.

Same: Transactions between husband and wife. While both husband and wife are liable for family necessities, yet the wife may refuse to expend her professional earnings for that purpose except upon an agreement of the husband to repay her, and if such an agreement is in good faith made and thereafter carried out it is not voidable at the suit of the husband's creditors. *Idem*.

Dower: Release by wife: Joinder. A husband and wife need not join in the same conveyance to effect a release of the latter's contingent right of dower; a quitclaim of all her interest by the wife alone to the grantee of the husband in a prior conveyance is effective to bar her dower therein. *Fowler v. Chadima*, 210.

HUSBAND AND WIFE Continued TO INSTRUCTIONS

Separate estate of the wife. Property acquired by the wife with funds arising from her own separate enterprise, carried on with the consent of her husband, cannot be subjected to the payment of his debts; and labor performed by the husband in improving the property will not render it his, since he may give his time and exempt earnings to his wife if he chooses. *Green v. Forney*, 316.

INDICTMENT. See CRIMINAL LAW.

INFANTS—EXPOSURE OF. See CRIMINAL LAW.

INJUNCTION. See JUDGMENTS—INTOXICATING LIQUORS—TAXATION.

Dissolution. Generally the action of the trial court in dissolving a temporary injunction will not be reversed on appeal, where the answer denies the allegations of the petition which are essential to entitle the plaintiff to relief; and this is especially true where it is sought to enjoin a city from condemning land to protect its water supply solely on the ground that the condemnation proceedings are a sham and in the interest of private parties, and there is no showing of damage nor that the matters relied upon can not be urged in the condemnation proceeding. *Laplant v. City of Marshaltown*, 281.

Same. The merits of a controversy will not be determined on a motion to dissolve an injunction. *Wingert v. City of Tipton*, 97.

Temporary injunction: Notice. A temporary injunction restraining a city from levying a special assessment and issuing certificates therefor, is not an interference with the ordinary business of the corporation within the meaning of Code, section 4359, requiring notice when such is the effect of the order sought. *Wingert v. City of Tipton*, 97.

Inadequacy of bond. Inadequacy of the bond is not ground for dissolving a temporary injunction, unless there is a failure to comply with an order for additional security. *Wingert v. City of Tipton*, 97.

INHERITANCE TAX. See TAXATION.

INSTRUCTIONS. See FRAUD—INTOXICATING LIQUORS—NEGOTIABLE INSTRUMENTS. In Criminal Cases, see CRIMINAL LAW.

Burden of proof. Under Code, section 3639, an instruction which casts upon a defendant the burden of proving all his defenses to an action, rather than any one of them, is erroneous. *Williamson v. Robinson*, 345.

INSTRUCTIONS Continued

Direction of verdict. Where there is a conflict in the evidence touching a material question of fact the issue must be submitted to the jury. *Snyder v. Thompson*, 725.

Life tables. An instruction which authorizes the consideration of a life table, in connection with other proven facts and circumstances, is not objectionable as arbitrarily basing the expectancy on such table. *Croft v. Railway Co.*, 411.

Same. Where no direct attempt is made to show the life expectancy of the husband, suing for loss of services of the wife, and the record discloses that there is not considerable disparity between their ages, error can not be predicated on an instruction which makes no reference to the expectancy of the husband. *Idem*.

Recall of jury: Correction of error. After the return of a sealed verdict the court has no authority to recall the jury and send them out under further instructions with a view to further findings which shall in effect declare the rights of the parties to be other or different than are found and declared in the sealed verdict, but may recall and send them back with instructions to correct a manifest error in form, or to supply an omission of some matter necessary to complete the verdict as already found. *Savings Bank v. Cook*, 185.

Recital of evidence: Omission of material item. Where the court in its instructions undertakes to epitomize the various matters of evidence which the jury may take into consideration on a given question, the omission of any material item bearing thereon is prejudicial error. *Flint v. Insurance Co.*, 531.

Reference to evidence. The court in its instructions should not call special attention to circumstances favorable to one party and omit all reference to those favorable to the other party. *McBride v. Railway Co.*, 398.

Refusal. A requested instruction supported neither by the pleadings nor evidence should be refused. *Ranck v. City of Cedar Rapids*, 563.

Error cannot be predicated on the refusal of the court to give instructions, where no exception was taken to the refusal, where the same so far as announcing correct rules of law are covered by those given, or, where they do not cover the case made by the evidence. *Dean v. Carpenter*, 275.

It is not erroneous to refuse instructions which would have lead to a different verdict when the evidence supports the verdict as rendered. *Long v. Telephone Co.*, 336.

INSTRUCTIONS Continued

TO

INSURANCE

Stating the issue. In stating the issues the court may copy the pleadings when the same are a clear and concise statement and counsel have agreed thereto. *Dean v. Carpenter*, 275.

Conceding the impropriety of making a literal copy of the pleadings in stating the issues to the jury, a party who has consented to such procedure cannot insist that it was erroneous. *Savings Bank v. Cook*, 185.

Uncontradicted evidence: Submission of issue. Where the evidence in favor of a party having the burden of proof on an issue is in no way contradicted or impeached, the court may assume the fact relied upon as proven, and need not submit that question to the jury. *Johnson v. Buffalo Center Bank*, 731.

When not required to be in writing. The court is not required to reduce to writing all the admonitions which it may be proper to give the jury during the progress of the trial, respecting the consideration of evidence. *Krause v. Redman*, 629.

Withdrawal of issue. Where there is a conflict in the evidence on the question of an exercise of care on the part of a motor-man in endeavoring to check the speed of his car in time to have avoided an accident, it is error for the court by its instructions to withdraw that issue from the jury, although it is conclusively shown that he had sufficient time. *McBride v. Railway Co.*, 398.

INSURANCE.

Beneficial insurance: Form of action by beneficiary. The beneficiary in a mutual benefit certificate is entitled to prosecute his action at law for the amount due, rather than in equity, to compel the association to levy an assessment to meet the death loss of the member, where it is provided by the certificate and by-laws that the association shall pay all death losses from a fund to be raised by assessments made at the discretion of the board of directors, and the petition alleges that the society has on hand in such fund a sum largely in excess of the amount required to pay the certificate. *Van Norman v. Modern Brotherhood*, 575.

Compromise and settlement: Estoppel. Where an assured has absented himself from the State and concealed his whereabouts for a period of seven years, and rather than contest the question of his death the insurance company elects to pay the loss to a duly appointed administrator, it amounts to a compromise and settlement based on the assertion of his death and is binding and conclusive on the company, though it may after-

INSURANCE Continued

TO

INTOXICATING LIQUORS

wards appear he was still living. *Insurance Co. v. Chittenden*, 613.

Representations of agent: Estoppel. An insurance company is bound by the representations of its authorized agent who receives and forwards an application and thereafter notifies the insured that the application has been approved and the policy forwarded to him for delivery; and upon the death of the insured, prior to any knowledge to the contrary and before maturity of a note given for the premium, the company is estopped to deny the contract and plead a counter proposition sent the agent to be submitted to the insured. *Kimbrow v. Insurance Co.*, 84.

Payment of premium to agent. Where it is the common practice known to the company for an insurance agent to accept notes for the first premium payable to himself, and to stand responsible to the company therefor, the transaction amounts to payment of the premium as between the insured and insurer. *Idem*.

INTERVENTION. See **DRAINAGE**.

INTOXICATING LIQUORS.

Assessment of mulct tax: Procedure. Taxation in itself is the exercise of an extraordinary power and the procedure pointed out by statute for accomplishing the same must be strictly pursued; so that when it is sought to impose a mulct tax under the provisions of Code, section 2435, as amended, the citizens who are authorized to institute the proceeding must themselves serve the notice and make proof thereof, to confer jurisdiction upon the auditor to assess the tax; it cannot be done by another. *Loan & Invest. Co. v. Supervisors*, 527.

Nuisance: Injunction: Notice: Jurisdiction. Where a temporary injunction is sought to restrain an alleged liquor nuisance the same formality of notice is required as in any other form of action, and a notice which fails to name the judge to whom the application will be made and the particular place where it will be heard is insufficient and does not confer jurisdiction, and any decree entered in pursuance thereof is void and may be assailed in any court. *Beck v. Vaughn*, 331.

Same: Want of jurisdiction: Waiver. Appearance to a contempt proceeding for violating a temporary injunction, which was issued without jurisdiction, will not confer jurisdiction to enter a valid decree on final hearing. *Idem*.

Same: Action in name of State. Only the county attorney is authorized to bring an action in the name of the State to re-

INTOXICATING LIQUORS Continued TO JUDGMENTS

strain a nuisance and when so brought in the name of another the court does not acquire jurisdiction. *Idem*.

Same: Evidence: Review. Where the evidence in an action to restrain a liquor nuisance is in irreconcilable conflict on the question of illegal sales, the judgment of the lower court, having the opportunity to observe the demeanor of the witnesses while testifying, will not be disturbed on appeal. *Sargent v. Owen*, 365.

Wrongful sale: Damages: Defenses. Under the statute all sales of intoxicating liquor to a person in the habit of becoming intoxicated, or using intoxicants as a beverage, are made at the peril of the seller; and on the prosecution of any cause of action growing out of the wrongful act, the good faith of the seller, or his ignorance of the habits of the buyer, is immaterial. *Bristline v. Ney Bros.*, 172.

Same: Proof required of plaintiff: Instructions. In an action for damages by the wife for the wrongful sale of intoxicating liquor to her husband, who committed suicide while intoxicated, it is only necessary to satisfy the statute for her to show that the act was committed while he was in fact intoxicated with liquor sold him by defendant; she cannot be required to assume the burden of showing that he would not have committed the act had defendant not sold him the liquor. *Bristline v. Ney Bros.*, 172.

JUDGMENTS.

Enforcement of judgment by assignee: Injunction: Set-off. The assignee of a judgment on a replevin bond, taken in satisfaction of an attorney's lien for services rendered plaintiff in the action, holds the same subject to any set-off in favor of the judgment debtor as against the assignor, even without notice thereof; and an injunction will issue to restrain the enforcement of the judgment. *Separator Co. v. Sharpless*, 28.

Same: Estoppel. The fact that plaintiff in replevin had not given notice of a set-off against a judgment rendered on his bond, is not ground for estoppel precluding him from maintaining a suit in injunction to restrain enforcement of the judgment in the hands of an assignee. *Idem*.

Conclusiveness: Identity of parties. A school township having once litigated to final judgment its rights as against an independent district cannot relitigate the same rights by the simple expedient of bringing into the second action as defendants members of the board of directors who are not necessary parties. *School Twp. v. Ind. School Dist.*, 349.

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JUDGMENTS Continued

TO

JURORS

Same: Matters concluded. Where the judgment in a former action between the same school district of necessity involved a finding that a notice of election was sufficient, further inquiry into the sufficiency of the notice in a subsequent action is precluded. *Idem.*

Service upon non-resident. Service upon a non-resident made outside the State will not render the party a defendant in the case and does not confer jurisdiction to enter a personal judgment against him. *Richardson v. Richardson*, 242.

JURISDICTION.

Correction of court records. A judge while holding court in one county has no jurisdiction, in the absence of agreement, to make an order correcting the court records of another county, even on notice. *Williams v. Dean*, 216.

Justices of the peace. Under the provisions of the Code of 1873, a Justice of the Peace acquired jurisdiction of a non-resident in the township of plaintiff's residence, where service was had in the county although in another township. *Jonas v. Weires*, 47.

Same. Where there is no qualified Justice in the proper township the suit may be brought in an adjoining township, and, as no record is required to be made of the fact, the statutory presumption that there was a valid reason for bringing it in the adjoining township obtains. *Idem.*

JURORS.

Qualification. A challenge to a juror should be overruled where it appears from his examination that he has not formed or expressed an opinion on the merits of the case, or does not show such a state of mind as will preclude him from rendering a just verdict. From the examination in the instant case it is held that disqualification is not shown. *Croft v. Railway Co.*, 411.

Challenge to jurors: Specification of grounds. As a general rule a challenge to a juror for cause generally, without specifying the particular ground thereof, does not call for a ruling from the court; but where the examination clearly discloses the precise objection it is sufficient to require a ruling. *Harris v. Moore*, 704.

Same: Discretion: Prejudice. A cause will not be reversed because of the denial of a challenge for cause, where there is no showing of an abuse of discretion in so ruling, or that the party complaining had exhausted his peremptory challenges and was prejudiced by the ruling. *Idem.*

JUSTICE OF THE PEACE TO MINES AND MINING
JUSTICE OF THE PEACE. See JURISDICTION.

LANDLORD AND TENANT.

Failure to cultivate: Measure of damages. Where a farm is held for rent any temporary detriment growing out of a failure to properly cultivate the land should be compensated for on the basis of a loss in rental value, rather than a depreciation in the market value of the premises. *Brown Land Co. v. Lehman*, 712.

Same: Instruction. Evidence that a special course of treatment will be required to eradicate weeds, which have been permitted to grow upon land in violation of a lease, is competent on the question of damage to the rental value of the premises, and should be submitted with proper instructions. *Idem*.

LIMITATION OF ACTIONS. See PLEADINGS — REAL PROPERTY.

Mistake. The statute of limitations runs against an action arising from a mistake of the parties from the time the mistake might, in the exercise of ordinary diligence, have been discovered. *West v. Fry*, 675.

MARRIAGE AND DIVORCE.

Separate maintenance: Denial of right to defend. The allowance of temporary alimony, simply, upon the allegations of the petition for separate maintenance will not justify an order denying the defendant's right to defend the action prior to payment thereof; it must be made to appear that he is in contempt for failure to comply with the order for payment of alimony. *Hancock v. Hancock*, 475.

MASTER AND SERVANT. See NEGLIGENCE.

MINES AND MINING.

Leases: Royalty: Evidence. Under a contract providing that the lessee of an undeveloped mine should mine not less than a stated quantity each year, and in any event to pay a minimum royalty unless unavoidably prevented from taking out coal, he should have been permitted to show in defense to an action for the royalty that the mine could not be worked at a profit owing to the peculiar formation of the coal deposit. *Wilson v. Coal Co.*, 594.

Same. A lease obligating the lessee to mine all coal underlying the leased premises is satisfied by a removal of such as can be reached by the reasonable expenditure of money and labor

MINES AND MINING Continued TO MUNICIPAL CORPORATIONS

according to approved methods among practical miners in that territory. *Idem*.

Same. A mining lease provided that the lessee should commence operations within one year and pay as rent a stipulated price per ton, but in case of failure to mine as agreed he should pay specified advance royalties for the first and second years and thereafter that royalties should amount to a specified sum each year. No coal was mined the first two years, but advance royalties were paid. *Held*, that the same should be applied on the royalties first actually earned thereafter, and not on the excess earned over the royalty guaranteed. *Kissick v. Bolton*, 650.

MINORS.

Loans to trustee: Liability of estate. The estate of a minor is liable for money borrowed by a trustee, whether ordered by the court or not, where the funds were actually used for the benefit of the estate; and it is immaterial that the trustee had funds of the estate in his hands at the time. *In re Estate of Manning*, 165.

Personal earnings of minors. A minor cannot recover for time lost during his minority by reason of a personal injury, as his parents are presumptively entitled thereto. *Wilder v. Cereal Co.*, 451.

MORTGAGES. See AGENCY.

MUNICIPAL CORPORATIONS. See INJUNCTIONS.

Counties: Record of board of supervisors: Amendment. A board of supervisors after the lapse of four years, has no power to change or amend its record of the canvass of a statement of consent to the sale of intoxicating liquors, so as to make it show a finding that a majority of the voters of a certain township had signed the petition, where the original record contained no such finding, nor any statistics from which the board could have found such fact. *Brickley v. Westphal*, 266.

Ordinances: Effect of re-publication. A mere re-publication of ordinances in book form does not amount to a re-enactment so as to abrogate the rule that a later ordinance will, as to the subject matter covered thereby, control one previously enacted. *McBride v. Railway Co.*, 398.

Same: Construction. An ordinance as to a specific subject matter will control general provisions on the same subject which otherwise would prevail. *Idem*.

MUNICIPAL CORPORATIONS Continued

Same: Instruction. In construing the legal effect of an ordinance it is not error to set the ordinance out at length in an instruction. *Idem*.

Contracts for street improvement: Use of patent pavement: Competitive bidding: Injunction. A contract for a street improvement which is let to the lowest bidder is not in violation of the statute relating to competitive bidding by reason of the fact that the council, in its resolution authorizing the improvement and in its advertisement for bids, required the use of a patented pavement. *Saunders v. City of Iowa City*, 132.

Grading of streets: Consequential injury: Damages: Lateral support. A city, in bringing to grade a street in which it owns the fee, may excavate in front of abutting property to an extent that soil thereof loosens and slides into the street, thus requiring the owner to construct a retaining wall, without incurring liability for such consequential injury on the theory that it is a taking of private property without compensation; nor does the doctrine of lateral support as applied in cases arising between individuals have any application. *Talcott Bros. v. City of Des Moines*, 113.

Streets: Opening of same: Injunction. The owner of a tract of land embraced within a town plat which has been legally dedicated, although by means of a legislative act curing a defective acknowledgment of the plat, which became effective prior to acceptance of the streets, cannot enjoin the opening of the streets solely on the ground that the acknowledgment was defective. *Parriott v. City of Hampton*, 157.

Streets: Abandonment: Estoppel. While mere non-user for a period of ten years will not estop a municipality from asserting its right to a dedicated street, yet where there has been such non-user for not less than the statutory period accompanied by notorious, individual possession, under a claim of right, the public will be presumed to have abandoned its right. *Burroughs v. City of Cherokee*, 429.

Street improvements: Failure to comply with contract: Evidence: Injunction. One who contracts to perform the work of paving in accordance with certain specifications cannot, in default of compliance, recover on the contract; and abutting owners whose property is to be assessed on account thereof may enjoin the issuance of assessment certificates therefor.

Evidence held to show failure to comply with specifications. *Wingert v. City of Tipton*, 97.

Same: Objection to assessment: Estoppel. The question of compliance with a contract for street improvement is for the

MUNICIPAL CORPORATIONS Continued

city council, and individual taxpayers are not estopped to object to an assessment of their property to pay the expense thereof, by reason of the fact that they failed to make objection to the character of the work as it progressed. *Idem.*

Town plats: Dedication of streets: Acceptance. Before a town can insist upon its right to streets there must be an acceptance by it of the plat embracing the same, but this may be indicated by improvement, or notice to the proprietor that it will open and improve the same when needed; and the enclosure of streets by an ordinary fence, after dedication, will not estop the town from accepting the same. *Parriott v. City of Hampton*, 157.

Same. Under the Code of 1873, the filing of a duly acknowledged plat of an addition to an incorporated town conveyed the fee to the streets included therein, without an acceptance of the dedication by ordinance; and a plat so filed was not affected by the subsequent passage of a general ordinance requiring a submission to the council for its approval of all additional plats, since an ordinance of that nature was in excess of statutory power. *Burroughs v. City of Cherokee*, 429.

Same: Acceptance. While acceptance of the dedication of a town plat need not be by ordinance, yet there must be some acts on the part of the municipality from which an acceptance may be inferred before it can be charged with the burden of care and the safety of the streets included therein. *Idem.*

Same. The recording of a plat is a tender to the town of a conveyance of the streets and alleys embraced therein and continues, for a reasonable time, until either withdrawn or accepted; and what is a reasonable time depends upon the circumstances of each case. *Idem.*

Same: Additions: Acceptance by municipality. The adoption of an ordinance directing the construction of a sewage system along the streets of an addition will constitute an acceptance of the streets and alleys contained within the plat. *Idem.*

Same: Acceptance: Evidence. The evidence in this action, brought to enjoin a city from interfering with plaintiff's possession of certain alleged public streets, is reviewed and held insufficient to show an intention on the part of the city to decline an acceptance of the plat prior to the adoption of an ordinance providing for the future improvement of its streets. *Idem.*

Unauthorized acts of officials: Liability of towns. There is no fixed obligation on the part of a town to reimburse an officer who errs in his duty and commits an unauthorized and un-

MUNICIPAL CORPORATIONS Continued

TO

NEGLECT

lawful act whereby damage is imposed upon him in consequence of the wrong done. *Gormly v. Town of Mt. Vernon*, 394.

NEGLECT. See DAMAGES — PHYSICIANS — RAILROADS.

Assumption of risk: Instruction. The age and experience of a workman are proper matters to be considered in connection with the question of his assumption of risks incident to the use of machinery by which he is injured. *Wilder v. Cereal Co.*, 451.

Automobiles: Right on highways: Care. Under the statutes operators of automobiles have the same right to use the highways that drivers of horses or other vehicles possess, but they must exercise reasonable caution for the safety of others, and in determining the degree of care required the character of the machine, its speed, size, appearance, manner of movement, noise and the like may be taken into consideration. *House v. Cramer*, 374.

Same: Negligent operation. To allow explosions from an automobile engine while the machine is standing is not negligence, unless the operator sees, or by the exercise of reasonable care might see, that horses are frightened thereby; then failure to use reasonable diligence to stop the explosions and thus avoid an accident becomes negligence. Under the evidence no case of negligence requiring submission of the issue to the jury was made. *Idem*.

Elevator accident: Proximate cause. It is the duty of the owner of premises to protect those who enter the building, through a door allowed to be used for that purpose, from the danger of falling into an elevator shaft in close proximity to the entrance, either by suitable barrier or by giving warning of the danger. In the instant case failure to guard the shaft or give the warning is held to have been the proximate cause of plaintiff's injury, rather than the failure of one previously entering the door to fasten the same. *Gardner v. Separator Co.*, 6.

Same: Contributory negligence. Persons rightfully entering a building may assume that reasonable precautions have been taken for their safety, and are not required to especially look for dangers the existence of which imply negligence on the part of the owner; and the question of contributory negligence of one falling into an unguarded elevator shaft on rightfully entering a building is held, under the circumstances, to be for the jury. *Idem*.

NEGLECTENCE Continued

Same: Unguarded elevator shaft. The fact that the owner of premises containing an elevator has occupied and controlled the same but a short time, is no excuse in law for his failure to give notice of the danger or to properly guard the elevator shaft for the protection of one who goes upon the premises at his invitation, and who at the time is in the exercise of ordinary care. *Idem.*

Contributory negligence: Evidence: Instructions. The physical infirmity of a trespasser upon a train may be taken into consideration by the jury in determining his negligence in alighting while the train is in motion; but his age and experience should not be taken into consideration where there is nothing in the evidence to indicate that by reason thereof he was less able to exercise care and discretion for his own safety.

WEAVER, C. J., dissents from the opinion announced in this paragraph. *Doggett v. Railway Co.*, 690.

Evidence. Evidence of the usual and ordinary method of fastening pile drivers is admissible in an action by an employé for injuries alleged to have resulted from negligently fastening it. *Wilder v. Cereal Co.*, 451.

Same. Rules purely for the government of members of a fire department are immaterial in an action against a street car company for the negligent death of a member of the department. *McBride v. Railway Co.*, 398.

Fact questions. Ordinarily questions of proximate cause, assumption of risk and contributory negligence are for the jury, and when properly submitted the finding of the jury will not be disturbed. *Wilder v. Cereal Co.*, 451.

Imputed negligence. Any negligence of the driver of a fire wagon which collided with a street car causing the death of a member of the department, who was riding on the rear of the wagon, cannot be imputed to the deceased; nor does the rule governing the negligence of one engaged with others in a common enterprise have any application. *McBride v. Railway Co.*, 398.

Instinct of self-preservation: Instruction. In an action for negligence resulting in the death of plaintiff's intestate, refusal to instruct the jury to take into consideration the instinct of self-preservation in determining the question of deceased's contributory negligence is not erroneous, where there was no reference to the subject upon the trial. *McBride v. Railway Co.*, 398.

Master and servant: Negligence of master: Evidence. Under the evidence the question of whether defendant's foreman was

NEGLIGENCE Continued

negligent in directing plaintiff to remove a cross arm from one of its telephone poles without advising him of a possible danger, unknown to plaintiff but which the foreman might reasonably have known, that the pole would spring when the cross arm was removed, was for the jury. *Long v. Telephone Co.*, 336.

Same: Liability of master. Where the unsafety of a place at which an employé is directed to work does not arise from an act of his but from a previous condition known only to the master, which rendered the place unsafe, the rule that the master is relieved of the duty to furnish a safe place where it becomes unsafe during the progress of the work, has no application. *Idem*.

Safe place to work: Warning: Care. In the exercise of ordinary care the master is bound to warn a servant against danger which he has reason to believe is likely to occur upon the happening of a certain contingency, and of which the servant has no knowledge. *Idem*.

Same: Vice-principal: Negligence. A superintendent of construction work directed to procure a pile driver and arrange the same for use becomes a vice-principal, whose negligence in setting up the machine is that of the master, and the master is liable for an injury to a workman resulting from such negligence. *Wilder v. Cereal Co.*, 451.

Same: Negligence: Statutes. A female under the age of eighteen years engaged in removing soiled muslin from the rollers of an ironing machine, while the same are in motion, and in replacing clean sheeting, is held within the provisions of section 4999b, Code Supplement 1902, prohibiting direction to such an employé to clean moving machinery. *Bromberg v. Laundry Co.*, 38.

Same: Pleading. Directing a female under the age of eighteen years to clean moving machinery is negligence *per se*, under the Statute; and a petition alleging that at the time of her injury plaintiff was under eighteen years of age and defendant negligently allowed her to do such work, is broad enough to permit an application of the Statute without a specific reference thereto. *Idem*.

Same: Assumption of risk. Under section 4999b, Code Supplement 1902, a female less than eighteen years of age is presumptively incapable of appreciating the dangers arising from the operation of machinery and will not be held to have assumed the risk incident thereto, unless the employer affirma-

NEGLECTANCE Continued

TO

NEGOTIABLE INSTRUMENTS

tively shows that she had sufficient capacity to appreciate the risk, and this is a question of fact for the jury. *Idem*.

Same: Negligence of servant. A master is not liable for the act of his servant, done in the ordinary and usual performance of his duty, which results in an injury to a third person whose presence the servant neither knew nor had reason to know. *Thyssen v. Ice & Storage Co.*, 749.

Same. Where a servant has no authority to employ another to assist him in his work, the master is not liable for an injury to a stranger, resulting solely from the negligence of the assistant, on the ground that he was also a servant. *Idem*.

Street railways: Negligence: Evidence: Admissibility. An ordinance providing that the apparatus of the fire department shall have the right of way upon the streets, while responding to an alarm of fire is admissible in an action for the death of a fireman killed by the collision of a wagon, on which he was riding, with a street car, as bearing on the question of the exercise of care by the motorman; while an ordinance prior in time of enactment giving to street cars the right of way in matters of ordinary street traffic is inadmissible. *McBride v. Railway Co.*, 398.

NEGOTIABLE INSTRUMENTS. See CORPORATIONS.

Bills and notes: Defenses: Instructions. A defendant in a suit on a promissory note alleged in defense that the note was given to secure money with which to purchase horses and that he signed the note simply as surety, that to indemnify him this defendant retained an interest in the horses so purchased, but that he released his interest upon an agreement of plaintiff to discharge him from such liability; that after such discharge plaintiff appropriated the proceeds of certain other notes belonging to him and deposited as collateral security for the notes in suit. *Held*, that an instruction that if the agreement contended for by defendant was proven he was absolved from liability on the note and entitled to have his collateral restored to him was correct; but if erroneous the plaintiff could not complain. *Savings Bank v. Cook*, 185.

Consideration: Compounding crime. It is not necessary to show that a crime was in fact committed to defeat an action on a note given to compound the offense charged. *Joyce Co. v. Rohan*, 12.

Same: Agency: Question of fact. Where there was evidence tending to show that the payee of a note, who filed the information charging defendant with the crime and accepted

NEGOTIABLE INSTRUMENTS Continued TO

NEW TRIAL

the note in compounding the offense, was acting as the agent of the indorsee in both matters, the question of agency was for the jury and a direction of verdict for the indorsee in a suit on the note was erroneous. *Idem*.

Limitation: Reviver. To revive a cause of action founded upon contract the written admission must clearly and directly express the indebtedness admitted; an agreement reviving one note of a series is not an admission that the others are unpaid. *Finn v. Seegmiller*, 15.

NEW TRIAL.

Amendment of pleading. After the overruling of a motion for a new trial, based on an error in the instruction and failure of the testimony to sustain the verdict, the court should not permit an amendment introducing a new cause of action which will bring the case within the instruction and the evidence. *Cole v. Thompson*, 685.

Amendment after verdict. After a plaintiff has submitted his cause upon one theory and a verdict has been returned against him, he cannot, by way of amendment to his petition demand a new trial on a materially different theory. *Thyssen v. Ice & Storage Co.*, 749.

Discretion. A motion for new trial is addressed to the discretion of the court, but this is a legal discretion and must be exercised according to the rules of law, and where it appears that it has not been so exercised the order will be reversed. *Snyder v. Thompson*, 725.

It was not an abuse of discretion to refuse to set aside a judgment and grant a new trial to a defendant who had appeared in the action, but before trial was compelled to enter a hospital for treatment, where it appeared that the cause was continued several times for his benefit and there was no showing that he had taken any of the usual precautions, which a man of ordinary prudence having a cause pending for trial would have taken. *Savings & Loan Ass'n v. Kent*, 444.

The ruling on a motion for new trial, in a personal injury action, based on a contention that the testimony of plaintiff was contrary to the physical facts will not be disturbed on appeal, where the jury found that plaintiff's evidence was entitled to belief, and from the evidence offered to the motion and a personal test the court found that it did not involve a physical impossibility. *Foster v. Railway Co.*, 67.

Evidence. The fact that an assignee of corporate stock subsequently voted the same is not ground for a new trial, since that fact could not have been shown on the original trial; nor is false swearing in itself ground for new trial.

NEW TRIAL Continued

TO

OFFICERS

Evidence of false swearing, if admissible, held insufficient to warrant a new trial on petition. *Dooley v. Mines & Milling Co.*, 468.

Evidence. The testimony of jurors, that they gave consideration to evidence improperly admitted, is competent in support of a motion for a new trial based on their misconduct in disregarding an instruction withdrawing the same from their consideration. *Brown Land Co. v. Lehman*, 712.

Evidence as to the length of time it will take to eradicate weeds, which have been permitted to grow in violation of a lease, is material on the question of depreciation in the rental value of the premises. *Idem*.

Misconduct of jurors. For jurors to read, during the trial, local newspaper accounts of the evidence and proceedings in the cause is misconduct authorizing a new trial, although the jurors testify that they were not influenced in their action thereby. *State v. Caine*, 147.

NUISANCE. See INTOXICATING LIQUORS.

Blacksmith shop: Abatement. It is the duty of one who locates a blacksmith shop within a few feet of the dwelling house of another to keep it clean from filth and odors likely to interfere with the comfortable enjoyment of the adjacent property; and if it is not capable of being so conducted it should be abated and the business removed. *Hughes v. Scheuerman Bros.*, 742.

OFFICERS.

Appointment to office: Soldier's preference. An honorably discharged soldier or sailor is not entitled to a preference, in the matter of appointment to office, unless his qualifications are equal to those of his competitors. *McBride v. City of Independence*, 501.

Character of work: Determination by Secretary of State: Collateral attack. The determination by the Secretary of State in accordance with Code, section 120, that the State Binder has done his work in compliance with law is final and cannot be collaterally attacked. *State v. Young*, 505.

Over-payment: Recovery. Over-payment to the State Binder for work done for the State under the statute fixing the compensation is not a voluntary payment and the State is not concluded thereby, although paid on the certificate of the Secretary of State whose duty it is to compute the amount owing from an examination of the work; and it is immaterial whether the overpayment was made through mistake or design. *Idem*.

OFFICERS Continued

TO

PARTITION

Falsification of accounts: Evidence: Instruction. Proof of a corrupt purpose or motive is not necessary to support an indictment charging a public officer with falsifying the books of account of his office; that it was wilfully or intentionally done is sufficient; and an instruction that defendant could not be held liable for mere discrepancies arising from oversight, forgetfulness or incompetency, but that if they were knowingly and intentionally made he would be liable, was as favorable as he could rightfully expect. *State v. Hanlin*, 493.

Same. The fact that accounts are entered in a book not required by law to be kept is not a defense to a prosecution for falsifying the accounts of a public office; if the same are kept in some book in the office from which settlement is to be made with the parties to whom the funds belong it is sufficient. *Idem.*

Same: Liability of deputy clerk. A deputy clerk of the court may be convicted of falsifying the accounts of a public office under Code, section 4910, irrespective of whether he is an officer within the legal definition of the term, as the statute is not restricted to public officers. *Idem.*

Sheriffs: Fees. A sheriff who performs the duties of a constable acts in his capacity as sheriff and not as constable, and the fees for services in performing such duties are to be taken into account in fixing his salary. *Jones County v. Arnold*, 580.

Same: Excessive payment: Recovery by county. A county may recover back from a sheriff fees paid him in excess of what he was entitled to receive by reason of the fact that the board of supervisors failed to take into account fees which he had collected while acting as constable. *Idem.*

PARLIAMENTARY LAW.

Motion to reconsider. A motion to reconsider if carried leaves the original question precisely as it stood before the vote was taken, and in the absence of a special rule a motion to reconsider is carried by a majority vote notwithstanding the presiding officer may declare otherwise. *Wingert v. City of Tipton*, 97.

PARTITION.

Estoppel: Evidence. In an action for partition brought by one devisee against another the evidence is held to estop plaintiff from asserting any interest in lands devised to defendant, by reason of a prior mutual release or waiver of such interest, even though they may not have fully understood just what inter-

PLEADING Continued

TO

PRACTICE

the party pleading it at the time it became barred and was not barred at the time the claim sued on originated. *Idem*.

Form. A pleading which assails certain clauses of a petition and not the entire cause of action should be treated as a motion to strike rather than as a demurrer, although so denominated. *Frazer v. Andrews*, 621.

Intervention. A claim of title by a third party will not be tried on a petition of intervention in a suit to foreclose a mortgage. *Smith v. Redmond*, 70.

PRACTICE.

Reversal: Rehearing in trial court. A plaintiff who has suffered a reversal of his decree on appeal, may, in the discretion of the trial court have the former submission set aside for the purpose of a further hearing, upon a proper showing to that end; but this rule does not authorize the court to permit him, without tendering a different issue, to offer additional evidence and again submit his case upon a different theory. *Railway Co. v. Hemenway*, 523.

Reference of causes: Review of order. Objection to the reference of a cause for trial, which does not involve a jurisdictional question, cannot be raised on appeal, where the parties took no exception to the reference and appeared and tried the case before the referee. *West v. Fry*, 675.

Transfer of Causes. Where the pleadings do not present a case for the specific performance of a contract the court may transfer it to the law calendar for trial. *Robinson v. Luther*, 463.

Same. Where the issues are triable at law and the evidence is in such conflict as to require their submission to a jury, error in transferring the cause to the equity calendar for trial is prejudicial. *Van Norman v. Modern Brotherhood*, 575.

Change of venue: Public prejudice. A motion for change of venue is addressed to the discretion of the trial court and the appellate court will not interfere unless an abuse of its discretion is made to appear. In the instant case the overruling of a motion based on the prejudice of the community is not disturbed. *Croft v. Railway Co.*, 411.

Same: Review of application for change of venue. The Appellate Court in reviewing an application for change of venue based on prejudice of the community will not consider the record of the examination of the jury impaneled in the case. *Idem*.

Continuance: Surprise. Where an amendment is filed in the midst of a trial which raises an entirely new issue going di-

rectly to the merits of the controversy, the other party is entitled to a continuance upon a showing of surprise and want of time to meet the issue thus raised; nor should the court hold the party to a very strict and formal showing in this respect where the claim for time is made in apparent good faith. *Flint v. Insurance Co.*, 531.

Questions for the jury. It is for the jury to determine fact issues and when its finding is fairly supported by the evidence the verdict will not be disturbed. *Krause v. Redman*, 629.

Special interrogatories. When requested, special interrogatories, calling for ultimate facts essential to the determination of a cause involving different grounds of recovery, should be submitted. *Brown Land Co. v. Lehman*, 712.

Objection to proceedings. The court may disregard objection to proceedings where no reason is assigned therefor. *Telephone Supply Co. v. Telephone Co.*, 252.

PRESCRIPTION. See **REAL PROPERTY**.

PRINCIPAL AND AGENT. See **AGENCY**.

PUBLIC OFFICERS. See **OFFICERS**.

RAPE. See **CRIMINAL LAW**.

RAILROADS. See **CARRIERS**.

Crossing accident: Contributory negligence: Evidence. All that is required of a traveler in approaching a railway crossing is that he exercise ordinary care in looking and listening for approaching trains within a reasonable distance of the crossing, and when he stops and looks and listens it is for the jury to say whether he was in the exercise of ordinary care. Evidence held sufficient to take the case to the jury on the question of contributory negligence. *Meyer v. Railway Co.*, 722.

Killing of stock: Failure to fence: Proximate cause. Where stock strays upon a right of way by reason of the company's failure to properly fence the same and by some act of the employes of the company, whether negligent or otherwise, it is caused to run into a bridge and is thereby injured, the failure to fence together with the act of employes constitutes the proximate cause of the injury for which the company is liable. *Mikesell v. Railway Co.*, 736.

Same: Evidence. The fact that stock was in a pasture a short time before it was killed upon an adjoining right of way, and that at one point there was no right of way fence, will, in the absence of direct evidence upon the subject, justify the

RAILROADS Continued

conclusion that it went upon the right of way through the opening rather than that it jumped over a sufficient fence at another point. *Idem.*

Same: Submission of issues. Where a petition alleged failure to maintain a sufficient right of way fence and the evidence is undisputed that for some distance and for some time no fence whatever had been maintained, submission of the issue of failure to keep the fence in repair was without prejudice, even though there was no allegation to that effect; as proof of injury to stock by reason of a lack of fence, in connection with an operation of the road, made a *prima facie* case, and the burden was upon the company to establish the erection of a sufficient fence. *Idem.*

Negligence: Assumption of risk: Evidence: Instruction. In an action by the husband for injuries to his wife while assisting him in the performance of his duties in defendant's railway station, the evidence is held to show a deteriorating condition of the track at the place of injury from the time she commenced her service in the station; a negligent operation of a train at that point resulting in its derailment and the destruction of a portion of the station, thus causing the injury; and that she did not assume the risk of defendant's affirmative negligence in either respect. *Croft v. Railway Co.*, 411.

Same. A railway company, knowing that the wife of its agent is assisting him in his duties in the station is bound to expect her presence, and must exercise reasonable care in the operation of its trains to protect her from injury while so engaged. *Idem.*

Same: Care as to children. Where a railway company gives over a portion of its station to the agent for residence purposes, knowing that he is the head of a family, it is bound to know that he has one or more children and is held to the same care with respect thereto as though it had actual knowledge that the family included children. *Idem.*

Same: Recovery for injury to child. A parent, who, with knowledge of the owner is rightfully in a building presenting in itself no inherent danger may recover for an injury to his child, with him on the premises, caused by the active negligence of the owner from without whereby the building is demolished. *Idem.*

Trespassers: Required care. The conductor of a train owes a trespasser thereon no affirmative duty, and is only required to exercise ordinary care in ejecting him, and is chargeable only with what he knows, or in the exercise of ordinary care should know, of the danger of ejecting him from a moving train. *Doggett v. Railway Co.*, 690.

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REAL PROPERTY

REAL PROPERTY.

Adverse possession: Limitation of actions. Those desiring to question the title of one in possession of land under a recorded deed conveying the fee must do so within the statutory period after his assertion of exclusive ownership is made. *McCarthy v. Colton*, 658.

Adverse possession: Evidence. To create a title by adverse possession there must have been an uninterrupted, exclusively hostile possession, with intent to claim up to a certain line, no matter where the true line may be. *Boltz v. Colsch*, 480.

Boundaries: Acquiescence: Evidence. Where a division fence as originally built was not intended as marking the true boundary line, nor so treated by the parties thereafter, the doctrine of acquiescence does not apply.

Evidence held insufficient to show acquiescence. *Idem*.

Boundaries: Location by survey: Acquiescence. Agreement to abide by the result of a survey is immaterial to the establishment of a boundary line, where the parties have acquiesced in the location of a division fence constructed on the line located by the surveyor. *McBride v. Bair*, 661.

Same: Acquiescence. Acquiescence in a defined division line up to which adjoining owners have occupied and cultivated their lands for more than ten years will fix the true boundary between them. *Idem*.

Easement: Adverse possession. Mere user of a right of way over the land of another will not create a prescriptive right therein, even though with consent of the owner; there must also be a claim of right. *Idem*.

Prescription: Evidence. Evidence tending merely to establish a license to use a passageway is immaterial on the question of a prescriptive right therein, but though not competent on the issue of prescription its admission was without prejudice. *Idem*.

Eminent domain: Elements of damage: Evidence. In a proceeding to condemn property the measure of damages is the value of the property as it stood at the time of the appropriation; but this rule permits proof of all the varied elements of value which would properly and naturally be taken into consideration by the owner and a purchaser of ordinary prudence desiring the property. *Ranck v. City of Cedar Rapids*, 563.

Same. The owner of property sought to be condemned may show its value for a special use for which it has been fitted, and that a particular line of business has been conducted

REAL PROPERTY Continued

therein for a long time, thus giving an increased value to the location. *Idem.*

Same. Evidence of a general advance in price of property at the date of the condemnation in the immediate neighborhood of that sought to be condemned, although attributable to the very public improvement for the use of which the condemnation is being made, is admissible on the question of the owner's damage. *Idem.*

DEEMER and LADD, J. J., dissenting.

Same. To admit evidence of sales of other property as bearing on the value of that sought to be condemned there must be a showing of similarity of character and situation, or, if dissimilar, the difference should be made to appear that the jury may make proper allowance therefor in its consideration of the case. *Idem.*

Contracts for sale of land: Rescission. Where a purchaser of land on contract accepts the title after an examination of the abstract furnished, agreeing to take the land and pay therefor on the strength of the title as disclosed by the abstract, he cannot thereafter rescind and recover back the purchase money on the strength of imperfections in the title existing at that time. *Warner v. Hamill*, 279.

A vendor who has failed to furnish an abstract showing such title as he agreed to convey and is making no effort to perfect the same, is not entitled to a reasonable time to comply with his agreement after service of notice of rescission. *Fagan v. Hook*, 381.

Same: Restoration of property. Where a vendee on contract leased the land at the suggestion of the vendor a delivery of the lease with the rent to the vendor was sufficient restoration of the property to sustain a rescission of the contract. *Idem.*

Same: Estoppel. A purchaser of land on contract is not estopped to rescind for the vendor's breach to convey title by the fact that he failed to tender a lease and rent note prior to commencement of his action; or that he listed the land for sale, where no prejudice resulted to the vendor. *Idem.*

Same: Tender of performance. Where time is not the essence of a contract for the sale of land and the vendor has failed to furnish an abstract showing good title, as agreed, at the time fixed for performance, the fact that the purchaser was not in position to make his payment at that time will not defeat his right to rescission on subsequently tendering the amount due, if the vendor is still unable to convey good title. *Idem.*

REAL PROPERTY Continued

Exchange of properties: Measure of damages. Ordinarily, where an action is for the recovery of property and its value has been agreed upon by the parties, the measure of damages is the value thus fixed; but if the values designated in the agreement do not appear to have been specified with reference to the true worth of the property, but merely as incidental to some other purpose not involving the intention of determining that question, the measure to be applied is the fair market value. *Idem.*

Same. Upon rescission of a contract for the sale or exchange of real estate for personalty, the values of the property stated in the agreement do not govern the question of damages for the breach, since by rescission the contract is abrogated in its entirety; but upon failure to restore personalty which has been delivered the measure of recovery is its fair market value. *Idem.*

Rescission: Fraud: Evidence. The evidence in an action to rescind a contract for an exchange of properties is reviewed and held sufficient to show that the same was procured by the false representations of one of the parties, who, while representing himself as an agent was in fact a beneficial owner. *Smith v. Redmond*, 70.

Rescission: Decree. Upon rescission of a contract for the exchange of lands the decree should place the parties *in statu quo*. *Idem.*

Options: Proof. As against a stranger to the writing the parties may show by parol that it was intended the instrument should operate as an option rather than as an absolute contract for the sale of land. *In re Assessment of Shield Bros.*, 559.

Party walls: Limitation of actions. Where an adjoining owner makes use of a party wall erected by his neighbor he becomes at once liable to pay his proportion of the value of the wall, and a right of action in favor of either party, growing out of the construction or use of the wall, is barred in five years, under the general statute of limitations relating to injuries to real property. *Pier v. Salot*, 357.

Same. Where there is neither pleading nor proof that an adjoining owner concealed his use of a party wall the defense of limitations to an action for contribution is not overcome. *Idem.*

Same. Where an adjoining owner becomes liable for his proportionate value of a party wall, by attaching his building thereto, the fact that he fails to use a chimney in the wall until a later date will not toll the statute. *Idem.*

REAL PROPERTY Continued

TO

SALES

Same. The fact that one party in seeking to enjoin the adjacent owner from closing a chimney in a party wall, is proceeding on the theory that his use of the wall has not been such as to render him liable for a proportionate value thereof, does not affect his right to rely on the statute of limitations as a defense to a claim against him for contribution. *Idem.*

Same: Decree. When the roof of a building is built against a party wall in such manner as to form a gutter liable to become out of repair, to the injury of the adjacent owner, the decree defining the rights of the parties should require the gutter to be kept in repair. *Idem.*

RECEIVERS.

Right of debtor to assets. Where the business of a concern has passed into the hands of a receiver, under an order of court broad enough to cover a claim for damages, the debtor cannot sue to recover the same prior to a discharge of the receiver, or satisfaction of creditors, although the same may not have been listed among the assets. *Houts v. Brass Works*, 484.

REFERENCE OF CAUSES. See PRACTICE.

REPLEVIN. See JUDGMENTS.

RESCISSION. See CONTRACTS — REAL PROPERTY — SALES.

REVIVAL OF ACTIONS. See NEGOTIABLE INSTRUMENTS.

SALES.

Breach of warranty: Rescission. Where a number of telephones admittedly of the same design and quality are sold for use on one system, defendant is not required to test the entire number to entitle him to rescind the contract for a breach of the warranty. *Telephone Supply Co. v. Telephone Co.*, 252.

Warranty: Pleading: Estoppel. Where the plaintiff in an action on a contract for the sale of telephones admits in its reply that there was a warranty, it is thereafter precluded from denying that fact. *Idem.*

Proof of parol warranty. Where the memoranda of a sale does not purport to be a complete contract parol proof of a warranty is admissible. *Idem.*

Same. Where a printed warranty upon which plaintiff relies is not made a part of the contract it becomes one in parol, and it is for the jury to determine whether the warranty was in fact as printed, or was oral. *Idem.*

Warranties: Construction. In the interpretation of a writing the document must be read as a whole; so that in construing

SALES Continued

TO

SCHOOLS

an advertisement of fancy cattle offered for sale, containing a general warranty as to breeding quality and also providing that "a cow with calf at side is a proven breeder," the purchaser of a cow with a calf at her side cannot rely on the general warranty but takes the animal at his own risk. *Brown Bros. v. Korns & Lee*, 699.

Contract in writing: Variance by parol. A contract for the sale of goods which specifically states the mutual promises and undertakings of the parties, describes the goods sold, the specific sum to be paid, the manner and terms of payment and that the same is to be an absolute sale and transfer of the property, cannot be shown by parol to have been intended as a mere mortgage or conveyance in trust. *Doolittle v. Murray & Co.*, 536.

Ratification: Breach: Damages. Although one creditor made an unconditional purchase of his debtor's stock of goods agreeing in consideration therefor to pay other creditors with the balance to himself, and thereafter the debtor had no interest in or control over the same, yet the creditor's act in passing the title to one with whom the debtor had contracted to exchange it for land was a ratification of the act and the creditor was bound by the transaction; and upon his refusal to carry it out the debtor's measure of damages was the amount of the claims which the creditor agreed to pay and such other damages as resulted from his refusal to accept the land. *Idem*.

Multiplicity of actions: Suit on account: Bar to recovery. The sale of goods although at different times and upon different orders, payment for all of which has matured, constitutes but a single demand and separate suits based upon each distinct order and sale cannot be maintained, although in itself a complete transaction; and a recovery upon one such order and sale is a bar to an action upon the other sales then due. *Electric Co. v. Electric Co.*, 665.

Recovery of purchase price. Where the contract for the sale of a stallion provided for payment of the purchase price wholly from service fees, the death of the horse without fault of the purchaser relieved him from making further payment. *Swaney and Ganton v. Alstott*, 63.

SALE ON EXECUTION. See EXECUTIONS.

SEDUCTION. See CRIMINAL LAW.

SERVICE OF NOTICE. See JUDGMENTS.

SCHOOLS. See JUDGMENTS — TAXATION.

Formation of district. Under Code, section 2794, an independent school district may be formed from territory formerly

SCHOOLS Continued **TO** **TRANSFER OF CAUSES**

composing two or more independent districts or an independent district and a school township, without a concurrence of the boards of the districts out of which the new corporation is formed. *School Twp. v. Ind. School Dis.*, 349.

SHERIFFS. See **OFFICERS.**

SPECIAL INTERROGATORIES. See **PRACTICE.**

SPECIFIC PERFORMANCE. See **EQUITY.**

SOLDIER'S PREFERENCE. See **OFFICERS.**

STATE BINDER. See **OFFICERS.**

TAXATION.

Apportionment of school funds. The courts will not enjoin a county auditor, in an action brought against him only, from making an apportionment of school taxes based on the pupilage reported by the county superintendent; since in so doing he is performing a purely ministerial duty commanded by the statute. *Judson v. Agan*, 557.

Delinquent personal tax: Description of location. A description of the place where personal property was assessed, as it appears upon the delinquent personal property list of the county treasurer, which will enable a competent person upon inquiry of the treasurer to ascertain the exact location is sufficient to charge the real estate of the delinquent with the tax, as against a subsequent purchaser of the land, especially where there is no question regarding the name of the delinquent, amount, or year for which the tax was assessed. *Watkins v. Couch*, 1.

Inheritance tax: Property subject to. An inheritance tax attached to bequests of personal property to collateral heirs where the estate was still subject to the control of the Probate Court at the time the law became effective, and the same could not be defeated by any unauthorized settlement and distribution, made prior to the filing and approval of the executor's final report, and within the year allowed for filing claims and final settlement. *Montgomery v. Gilbertson*, 291.

Option contract for sale of land. A contract granting a mere option to purchase land in the future on specified terms is not taxable against the grantors as a credit. *In re Assessment of Shield Bros*, 559.

TRANSFER OF CAUSES. See **PRACTICE.**

TRESPASS

TO

WILLS

TRESPASS.

Measure of damages. Where it is not shown that the trespass of cattle continued through the season the measure of damages is not the rental value of the land, but the difference in value of the crops before and after the damage, especially where it appears other cattle trespassed upon the premises during the season. *Cole v. Thompson*, 685.

Same: Evidence: Instructions. Where there is no proof of damages in an action for trespass except the rental value of the land, the plaintiff is only entitled at most to nominal damages, and the court in submitting the case should point out the rule as to the measure of damages. *Idem*.

Same: Fact questions. Where there is no evidence of damage in an action for trespass except the rental value of the land, as a whole, and it appears that defendant used a portion of the tract trespassed upon in such manner that he should be held for use and occupation, it is for the jury to say whether there was a simple trespass or an implied agreement to pay rent. *Idem*.

Use and occupation. One who is a mere trespasser upon land cannot be held for the use and occupation thereof. *Idem*.

TOWN PLATS. See MUNICIPAL CORPORATIONS.

WARRANTIES. See SALES.

WATERS. See DRAINAGE.

Inland lakes: Rights of riparian owners. A riparian owner of land bordering on an inland lake, in which the water raises and lowers as dictated by the seasons and climatic conditions, takes only to high water mark. *State v. Thompson*, 25.

WILLS.— See COSTS.

Contest: Capacity: Evidence. The pleadings and decree in a suit by one as guardian of decedent against the proponent of her will cancelling certain contracts made by decedent at about the time of executing the will, on the ground of mutual incapacity, are admissible in a contest of the will on the issue of testamentary capacity, contestants being privies to the adjudication and proponent estopped to question the same. *In re Estate of Hendershott*, 320.

Dower: Election by widow. By Code of 1873 a widow given a specific bequest of personal property and a life estate in all other property, which included real estate, was not required to make an election but was entitled to take both the

WILLS Continued

specific bequest under the will and a distributive share of the real estate under the statute, there being no provision in the will inconsistent with her dower right; under such circumstances she became seized in fee of a one-third interest in testator's real estate. *Warner v. Hamill*, 279.

Legacies: Payment from realty. Where the intention of a testator to charge his realty with the payment of legacies is clearly deducible from the language of his will it may be resorted to for that purpose, although omitting to expressly so direct, in the absence of sufficient personalty; and a general pecuniary legacy together with a gift of the residue of the entire estate conclusively manifests an intention to charge the real estate as well as personalty. *Lacey v. Collins*, 583.

Undue influence: Evidence. In the absence of substantive evidence the circumstances are held insufficient to show undue influence in the execution of a will. *Johnson v. Johnson*, 33.

Same: Statements of testatrix. The statements of a testatrix that she would not have executed the will but for the harassing annoyance and importunities of her husband are not competent in proof of the exercise of undue influence, but are admissible as tending to show the state of her mind. *Idem*.

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